No. 80-5060

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LONNIE JOE CARTER, *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY, *Respondent.*

On Writ Of Certiorari To The Supreme Court of Kentucky

BRIEF FOR PETITIONER

KEVIN MICHAEL MCNALLY
ASSISTANT PUBLIC ADVOCATE
STATE OFFICE BUILDING ANNEX
Third Floor
Frankfort, Kentucky 40601
(502) 564-5255

Counsel For Petitioner

M. GAIL ROBINSON
ASSISTANT PUBLIC ADVOCATE
STATE OFFICE BUILDING ANNEX
Third Floor
Frankfort, Kentucky 40601
(502) 564-5226

Of Counsel

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QUESTION PRESENTED

Is it a denial of a criminal defendant's Fifth and Fourteenth Amendment rights against compulsory self-incrimination and to due process of law for a state court to refuse the defendant's request to instruct the jury that "the defendant is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way" when the defendant declines to testify for a reason unrelated to guilt or innocence and comment is made at trial by counsel and police witnesses regarding his failure to explain himself to the police and/or failure to testify at trial?

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OPINION AND JUDGMENT BELOW

Judgment was entered by the Christian County, Kentucky, Circuit Court on June 1, 1979 [Joint Appendix, hereinafter A, 9-10]. The opinion of the Kentucky Supreme Court was rendered on May 13, 1980 and is not reported [A, 73-74].

JURISDICTION

The opinion of the Kentucky Supreme Court was entered on May 13, 1980. No rehearing was sought and the mandate of the Kentucky Supreme Court was issued on June 3, 1980. The petition for writ of certiorari was filed on July 17, 1980 and was granted October 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

The Sixth Amendment to the United States Constitution, in pertinent part:

> In all criminal prosecutions the accused shall enjoy the right to a . . . trial, by an impartial jury . . .

The Fourteenth Amendment to the United States Constitution, Section One, in pertinent part:

> . . . nor shall any State deprive any person of . . . liberty . . . without due process of law . . .

STATEMENT OF THE CASE

Lonnie Joe Carter was indicted by the February, 1979 Christian County Grand Jury for third degree burglary of Young Hardware in Hopkinsville. Kentucky Revised Statute

(hereinafter KRS) 511.040.[1] The indictment alleged that Carter ". . . on or about December 22, 1978 . . . unlawfully entered the store building known as Young Hardware, with intent to commit a crime . . ." The indictment also charged petitioner with being a persistent felony offender in violation of KRS 532.080.[2] It was alleged that petitioner was convicted of the

---

[1] KRS 511.040 states: "(1) A person is guilty of burglary in the third degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in an uninhabited building. (2) Burglary in the third degree is a Class D felony." A Class D felony is punishable by ". . . not less than one nor more than five years" imprisonment. KRS 532.060(2)(d).

[2] Although the indictment did not state which degree of persistent felon was alleged, the specification of two prior felonies suggested a persistent felon first degree charge. KRS 532.080 states, in part: "(1) When a defendant is found to be a persistent felony offender, the jury, in lieu of the sentence of imprisonment assessed under KRS 532.060 for the crime of which such person presently stands convicted, shall fix a sentence of imprisonment as authorized by subsection (6) of this section. When a defendant is charged with being a persistent felony offender, the determination of whether or not he is such an offender and the punishment to be imposed pursuant to subsection (6) of this section shall be determined in a separate proceeding from that proceeding which resulted in his last conviction. Such proceeding shall be conducted before the court sitting with the jury that found the defendant guilty of his most recent offense unless the court for good cause discharges that jury and impanels a new jury for that purpose.

* * *

(3) A persistent felony offender in the first degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of two (2) or more felonies . . .

* * *

(6) A person who is found to be a persistent felony offender in the first degree shall be sentenced to imprisonment as follows . . .

(b) If the offense for which he presently stands convicted is a Class C or Class D felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten years nor more than twenty years.

(7) A person who is found to be a persistent felony offender in the first degree shall not be eligible for probation, shock probation, or conditional discharge, nor for parole until having served a minimum term of incarceration of not less than ten (10) years."

prior felonies of "Storehouse Breaking"[3] in 1973 and "Knowingly Receiving Stolen Property Over $100.00"[4] in 1977 [A, 3-4].

Petitioner's trial was held May 17, 1979 [Transcript of Evidence, hereinafter TE, 1]. The voir dire examination of the prospective jurors was conducted solely by the trial judge [A, 12-16]. Judge Stephen P. White read the indictment to the jury. He inquired whether the fact that the defendant ("the black man sitting next to his attorney . . .") is "of another race" would preclude a fair trial [A, 12]. Judge White inquired as to any influence of publicity regarding the case and any relationship to counsel or the defendant. The veniremen "nodded negatively" to each question [A, 12]. The prospective jurors indicated that any experience as, or relationship to, a victim of crime would not influence their judgment [A, 13]. Although various jurors were related to law enforcement personnel, this was said to have no bearing on their judgment [A, 14]. Judge White then stated "as you may have heard me explain before in the courtroom . . . [t]he fact that his man is under a charge or has been indicted has no weight against him as evidence . . . He sits there before you today presumed by the law to be as innocent as anyone else in this courtroom" [A, 14 — 15]. Judge White also referred to the Commonwealth's responsibility to "prove his guilt to your satisfaction beyond a reasonable doubt . . . [which] means exactly what it says. There's nothing technical about it and it shouldn't give anybody any trouble" [A, 15]. Voir dire was completed when the trial court received a negative answer to the question of whether there was "anything that I have not thought of that would . . . disqualify you. . . ." [A, 15].

The prosecution's opening statement recounted the evidence expected to be introduced at trial aganist petitioner

---

[3] KRS 433.190 (since repealed). "Storehouse breaking" is the forerunner of KRS 511.040, punishable by 1 to 5 years imprisonment.

[4] KRS 514.110, also a Class D felony. See n.1, *supra*.

[TE. 16 — 21]. A defense objection was overruled when the prosecutor mentioned that three police officers would testify regarding the questioning of Mr. Carter [TE, 20]. The prosecutor concluded that "We will put on this evidence . . . four, or possible [sic] five witnesses . . . and the Court will then instruct you . . . " [TE, 21]. Defense counsel's opening statement began:

> Let me tell you a little bit about how this system works. If you listened to Mr. Ruff you are probably ready to put Lonnie Joe in the penitentiary. He read you a bill, a true bill that was issued by the Grand Jury. Now, the Grand Jury is a group of people that meet back here in a room and the defendant is not able or not allowed to present any of his testimony before this group of people. The only thing that the Grand Jury hears is the prosecution's proof and I would say approximately what Mr. Ruff has said to you. I suppose that most of you would issue a true bill if Mr. Ruff told you what he has just told you and you didn't have a chance to hear what the defendant had to say for himself.
>
> Now, that is just completely contrary to our system of law. A man, as the Judge has already told you, a person is innocent until they are proved guilty . . ." [A, 16-17].

Defense counsel noted the prosecution must prove guilt beyond a reasonable doubt. He concluded: "As they will and as you have heard, they have got a lot of pieces tied up here but there are a lot of pieces that are missing too . . . Listen to this case with an open mind all the way through it and don't make up your mind until . . . all of the evidence is in . . ." [A, 17].

The first witness at trial was Officer Beborah K. Ellison of the Hopkinsville Police Department (H.P.D.) [A, 18]. Officer Ellison was on downtown patrol in her squad car on the night of December 22, 1978, shortly before 2:00 A.M. [A, 18]. it was a "quiet" night although "several people" were on Virginia Street nearby "where the bars are" [A, 18]. "[O]n Sixth Street in between Main and Virginia . . . " Ellison noticed something in the alley next to Young hardware. She

backed her car up and turned on her spotlight [A, 19]. Two black males were "stooped along the side of the building." They "took off running." Officer Ellison "maneuvered the cruiser down through the alley . . . [and noticed] a hole knocked in the side of Young hardware . . . " She called for assistance from Officer Davis who she knew was in the area. Ellison attempted to pursue the "two subjects, one was tall and thin, and was wearing rust colored slacks and a dark colored shirt and he was carrying some items in his hand and the other subject was short and stocky and he had a light colored type jersey shirt on and . . . dark colored slacks . . . " The "short subject just disappeared . . . " He didn't appear to be carrying anything [A, 19, 30]. The "tall thin one" ran "toward Fourth Street" and Officer Ellison "lost sight of him completely . . . " [A, 19]. Ellison drove through the alley, turned right on Fifth Street, left on Virginia Street and left on Fourth Street, "I didn't see any sight of them." She turned around and made another left on Virginia, heading to Third Street. At about that time "Officer Davis said he had one of them in custody" [A, 19 — 20, 31 — 32]. Ellison drove down Third to Main and returned to the alley. She testified that the incident lasted two or three minutes [A, 20, 32]. In the alley, Ellison observed that some bricks had been removed from the wall of Young hardware. A few "items" were lying near the wall. There were also two coats [A, 20]. In searching the scene, no burglary tools or crowbars were found [A, 34-35].

Officer Davis then "brought the subject around for me to identify . . . " Ellison stated that the "subject" (petitioner) "appeared" to have the same clothing "the man I saw running" [A, 22]. The person that ran off did not have a coat on although it was "rather cold" [A, 23]. Officer Ellison admitted that "it was fairly dark in the alley and I didn't get a real close look of [sic] his face" [A, 29]. She was not able to "identify any features of either of . . . [the men], just their physical outline, height and width" [A, 30].

When petitioner was brought to the police station, "he didn't want to say anything" [A, 23]. After a "hearsay" objection was overruled, the prosecutor returned to the subject of petitioner's refusal to make a statement:

> Q At that time did he make a statement?
>
> A No, sir, he did not and he would not waive [sic] a waiver certificate either.
>
> Q And he refused and he did not want to make a statement?
>
> A That's right, sir.
>
> THE COURT: Just a minute, Mr. Ruff, let me ask a question. [A, 24].

Judge White then inquired of Officer Ellison in the presence of the jury whether Mr. Carter was given "his full Miranda rights." Ms. Ellison replied that petitioner was read "the standard certificate" [A, 24]. Mr. Ruff then again focused upon petitioner's reticence:

> Q And did you then fill this out and present it to him for his signature?
>
> A Yes, sir.
>
> Q And he did not desire to sign that, is that correct?
>
> A That's correct.
>
> Q But you showed him what his rights were and he evidently understood them because he said that he did not want to make a statement, is that correct?
>
> A Yes, sir. [A, 25].

The "waiver form" was introduced into evidence [A, 25]. On the form, the police wrote: "Suspect refused to answer questions" [A, 72; Cw.Ex. 15]. However, Officer Ellison went on to testify that when petitioner was questioned later by Major Colon, petitioner admitted he was "by himself" and that "both . . . coats belonged to him . . ." [A, 25].

Officer LeRoy Davis, H.P.D., was the next witness [A, 37]. On the night in question, Officer Davis was in his patrol

car at the corner of Fifth and Virginia "observing" some people on the street when he "heard Officer Ellison give out a call that there were two black males in the alley . . . beside Young Hardware . . ." [A, 37]. He saw two figures run across Fifth Street and go in opposite directions. Davis drove down Virginia Street, losing sight of the person, until apparently the same individual ran across Fourth Street [A, 37-38]. Davis continued driving a parallel course, again losing sight of the person, took a left on Third Street, stopping by an alley just as petitioner appeared [A, 38]. Petitioner refused an order to stop, but did so when Officer Davis left his vehicle and gave chase [A, 38]. Davis testified that petitioner dropped two items — a bag and a radio — shortly before he stopped. The radio was allegedly set on a police band and had an "earphone" although the police officers had trouble getting it to work [A, 40, 50]. Finally, the officer testified that petitioner refused to explain himself under questioning at the police station:

> Q Did you give Lonnie Joe Carter his rights under the Miranda Act or did someone do it?
>
> A It was given to him at the station.
>
> Q Did he make any statement at that time?
>
> A No, he didn't. After we give him his rights we asked him some questions but he really wasn't doing too much talking. [A, 42].

Overruling a defense objection to "leading," the trial court permitted Officer Davis to testify that, after further questioning, petitioner stated: "There was no other guy. Both of these jackets belong to me" [A, 42]. Davis concluded by stating: "shortly after that he would not say anything else" [A, 46].

The third witness was Mack Arthur, owner of Young Hardware Company [TE, 80]. He identified a few items found on the ground outside the hole and testified that "nothing of great value" was removed from the shelf inside

the hole [TE, 80-81]. He explained there was "no entrance gained" because the storage racks blocked the hole [TE, 83].

The last witness was Major Rusty A. Colon, H.P.D. [A, 48]. He testified that he interrogated petitioner (after the other officers had ceased questioning him) without additional "Miranda" warnings [A, 49, 51]. Two or three other officers were present [A, 49]. Colon asked petitioner if he "intended to go it all by himself . . ." [A, 49]. In response petitioner allegedly stated "there was none other than himself . . . both of the iackets were his" [A, 49].

After the Commonwealth rested, a hearing was held regarding whether petitioner would testify and whether the trial court would permit the prosecutor to impeach petitioner with his prior felony convictions [A, 54-59]. Defense counsel stated:

> Judge, I think possibly the only reservation Mr. Carter might have about testifying would be his impeachment by the use of these previous offenses that he is aware of and has told me about. I would like to explain to him in front of you what this all means. [A, 54].

Counsel explained to Mr. Carter that if he testified the Commonwealth could "use the fact that you have several offenses on your record . . . [to] impeach your . . . propensity to tell the truth . . . Counsel added that in his experience this was "a heavy thing; it is very serious, and I think juries take it very seriously . . ." [A, 55]. Judge White noted that under Kentucky law the trial judge "has discretionary control" over the use of prior felony convictions for impeachment [A, 55]. The prosecutor indicated his intention to use the same felony convictions for impeachment which were to be placed in issue in the persistent felon phase of the trial. This was not actually necessary since petitioner had been convicted of other felonies which qualified for impeachment. Judge White aquiesced in this decision:

> THE COURT: . . . Grady, I don't think it is safe for I think you are inviting a reversal on the inflammatory

ground if you get above three and I think three would be the limit that I would let you go and I would suggest that you pick out the most recent ones and if you could avoid the two that are involved in the second stage you would probably be better off.

HON. GRADY RUFF: I can't do that for those are the two most recent ones so that's the way it has to be.

THE COURT: Well, there's no rule that I know of that prohibits using those. It seems a little bit strange that they split the trial and made two stages of it with two aggravating or enhancing convictions or whatever you want to call them. [A, 57].

The record reflects that petitioner decided not to testify based upon the prospect of having to admit his prior convictions which were to be used to enhance his sentence. The trial court personally addressed the defendant:

THE COURT: . . . You can sit there and say nothing and it cannot be mentioned if you don't testify but if you do these other convictions can be shown to indicate to the jury that maybe you are not telling the truth.

LONNIE JOE CARTER: Are you saying the most recent convictions?

THE COURT: Well, they are the ones he plans to use. Now, do you understand what you are charged with?

LONNIE JOE CARTER: Yes, sir.

THE COURT: All right, you talk to Mr. Rogers and then tell us what you want to do.

* * *

THE COURT: Now, Lonnie, you have come back after a private conference with your lawyer, Mr. Rogers and you have told me you have decided not to take the stand?

LONNIE JOE CARTER: Yes, sir [A, 58].

Defense counsel summarized his private conversation with the defendant for the record, observing "that the advice of counsel to Mr. Carter was that in plain terms he was between a rock and hard place . . ."Counsel stated that if petitioner testified he would be impeached as permitted by the trial court and "if he didn't testify the jury, whether Mr. Ruff

commented on it or not, would probably use that against him." Counsel repeated that "the jury, in my experience, would use [the failure to testify] against him . . ." [A, 58-59].

Counsel indicated to the court in chambers that the defense had no other witnesses [A, 59]. Upon return "into open court," apparently in front of the jury, counsel "advised the court that there would be no testimony introduced for and on behalf of the defense" [A, 60]. Defense counsel tendered, and the trail court refused, *inter alia*, instructions or petitioner's right not to testify and on the prosecution's burden of proof.[5] The tendered instruction state:

> Instruction Regarding Defendant's Testimony
>
> The defendant is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way.
>
> Burden of Proof
>
> In a criminal case, the burden of proof always rests upon the prosectuion. The defendant is under no obligation to prove anything. The prosecution must prove every element of its case beyond a reasonable doubt. [A, 5].

In his closing argument to the jury, defense counsel began as follows:

> Ladies and Gentlemen of the jury, I am sure you all right now are wondering well what has happened? Why didn't Mr. Carter take the stand and testify? Let me tell you. The judge just read to you that the man is presumed innocent and that it is up to the prosecution to prove him guilty beyond a reasonable doubt. He doesn't have to take the stand in his own behalf. he doesn't have to do anything. [A, 60].

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[5] Petitioner properly followed Kentucky's "contemporaneous objection" procedure requiring a timely request for any instructions desired in addition to those given by the trial court. KY.REV.STAT., R.CRIM.PROC. 9.54(2) states, in part: "No party may assign as error the . . . failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion . . ." *Cf. Wainwright* v. *Sykes*, 433 U.S. 72 (1977).

The prosecutor began his summation by stating that he intended to review the evidence "that we were privileged to hear" [A, 64]. He cautioned the jury to "[c]onsider only what you have heard up here as evidence in this case and not something that you might speculate happened or could have happened . . . " [A, 64]. Reference was repeatedly made by Mr. Ruff to the fact that the Commonwealth's evidence was "not controverted." After mentioning petitioner's alleged admissions to the police, the prosecutor argued:

> Now that is not controverted whatsoever. It is not controverted that Lonnie Joe is the man that Miss Ellison saw here. It is not controverted that Lonnie Joe is the man that Davis caught up here (again pointing to blackboard sketch). It is not controverted that Lonnie Joe had that bag (pointing to bag on reporter's desk) and that radio (pointing to radio) with him. It is not controverted that both of those jackets belonged to Lonnie Joe. At least, that is what he told the police department. But, at any rate, that is all we have to go on . . . [A, 68].

Mr. Ruff asked the jury what Lonnie Joe's jackets were doing in the alley, arguing that the police believe he took "them off while breaking in there and there is nothing else in the record for you to find otherwise." The prosecutor continued that if there was a reasonable explanation why petitioner ran when he saw the police, it was "not in the record." He argued that various incriminating evidence had not "been explained to you" (the jury) and that other than the police theory "you have nothing else to go on" [A, 69]. "Now we say and the police department says there could be no other reasonable explanation . . . it is the only conclusion that you can draw from the evidence that you have heard here today . . . " [A, 69 — 70]. " . . . [S]atisfy yourselves on what you have heard up here today . . . " [A, 71].

Petitioner was convicted and sentenced to two years [TE, 127]. The recidivist phase of the trail was then held. The prosecution presented two witnesses who testified regarding petitioner's two prior felony convictions [TE, 131 — 137]. The

defense presented no witnesses. The jury found petitioner guilty as a persistent felony offender and sentenced him to the maximum, twenty years imprisonment [TE, 143]. Judgment was entered June 1, 1979 [A, 9 — 10].

On May 13, 1980, the Kentucky Supreme Court affirmed petitioner's conviction. The Court specifically rejected petitioner's argument that the Fifth and Fourteenth Amendments to the United Stated Constitution require that a protective instruction be given (at least under the facts of this case) regaring a criminal defendant's right not to testify when a timely request is made at trial.[6] *Carter* v. *Commonwealth*, File No. 79-SC-452-Mr, Memorandum Opinion Per Curiam at 5-6 [A, 77 — 78]. The Court likewise rejected petitioner's "due process" claim that the tendered burden of proof instruction should have been given [A, 82-83]. The Court stated that "it appears to us that . . . [Carter] received a fair trial, at least a tolerably fair trial . . ." [A, 84].

SUMMARY OF ARGUMENT

A defendant in a criminal trial is explicitly guaranteed the right to decline to testify by the Fifth Amendment to the United States Constitution. This fundamental constitutional right is applicable to state criminal proceedings through the

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[6] The Court stated the issue being addressed in its opinion:

> "The trial court's refusal to instruct the jury regarding appellant's right not to testify, in light of the facts of this case, violated the 5th and 14th amendments and Section 11 of the Kentucky Constitution" [A, 77].

The fact that the Court reached the federal constitutional issue on the merits is in stark contrast to the Court's refusal to address issues I, II, III, part of IV, VI, and IX as presented in petitioner's brief on appeal due to the failure to properly preserve these contentions at trial [A, 74-80, 83-84]. Some of these issues raised serious federal constitutional claims, such as the failure to "scrupulously honor" petitioner's decision to remain silent during police interrogation, *see Michigan* v. *Mosley*, 423 U.S. 96, 103-104 (1975), and extensive comment on his silence at that time. *See Doyle* v. *Ohio*, 426 U.S. 610 (1976). Petitioner's federal claim is properly before this Court. *Compare Taylor* v. *Kentucky*, 436 U.S. 478, 482 n.10 (1978).

Fourteenth Amendment. An essential aspect of this right is the necessary correlative principle that the defendant must suffer no penalty for the exercise of that right lest the right itself become meaningless. Thus, adverse comment on a defendant's failure to testify by counsel or the court has been prohibited in both federal and state criminal trials.

As any experienced trial counsel or judge recognizes, most jurors will expect a defendant to testify and will note when he does not even in the absence of adverse comment. Research in the social sciences, scholarly writings and opinions of many courts, including this one, have recognized this fact. Because of the natural tendency of many jurors to conclude that a criminal defendant is guilty from his failure to tell "his side of the story." there is an obvious and significant danger that the defendant's failure to testify will enter the jury deliberations and, in the absence of guidance from the court, be used as evidence of guilt.

The Fifth Amendment prohibits compulsory self-incrimination. This Court has wisely recognized that physical compulsion, i.e. torture, is not the only form of pressure prohibited by the Constitution. Adverse use of the invocation of the right not to be "a witness against [one]self" has correctly been recognized as a subtle but effective form of compulsion to testify. similarly, when a trial court permits to go unchecked the natural tendency of jurors to view as evidence of guilt the defendant's failure to testify, the citizen accused is also subjected to a subtle but equally (or even more) effective form of compulsion to testify, In reality, if the right against compulsory self-incrimination is to be more than a mirage, the Fifth Amendment requires some affimative action on the part of the trial court to remove the very real danger that the jury will be unaware of or ignore the command of our Constitution. It is petitioner's position that the traditional method of insuring the integrity of the fact-finding function is to provide proper jury guidance by instruction on basic principles of the applicable law. An instruction to the jury regarding a criminal defendant's explicit constitutional right not to testify is an ap-

propriate and constitutionally required procedure because it removes the very real compulsion to testify out of fear that the failure to do so will be used by a jury as evidence of guilt.

It is significant that at the time the Fifth Amendment privilege was incorporated into the Bill of Rights no adverse inference from its exercise was possible because the defendant was not permitted, and thus not expected, to testify. A prophylactic instruction is now essential to restore the original force of the privilege.

Aside from this Fifth Amendment analysis, the Due Process Clause of the Fourteenth Amendment is an independent and compelling source requiring a prophylactic instruction when a criminal defendant declines to testify. It has long been the law in federal courts that such an instruction is necessary. In so deciding, this Court recognized, as have many lesser authorities and commentators, that there may be valid reasons unrelated to guilt or innocence why a defendant in a criminal case may decline to testify. A particular defendant may, because of his appearance, individual personality, lack of intelligence, emotional situation, cultural background, etc., be unable to communicate effectively his position to the jurors or may otherwise create a poor impression. Additionally, because of the criminal procedure used in most states, criminal defendants who testify are subjected to impeachment by the use of evidence not necessarily relevant to guilt, such as prior felony convictions. In either case, a jury without proper guidance will likely jump to the natural, but wrong conclusion that the defendant remained silent because he is guilty.

Petitioner recognizes, of course, that the failure to give a particular instruction requested by a criminal defendant does not necessarily offend due process even if the instruction is universally approved and obviously desirable as a matter of policy. However, in the present case we are dealing with a requested instruction regarding an *explicit constitutional right*. Certainly, if due process of law means anything, it means that the jury in a criminal trial must be instructed as to what the

United States Constitution clearly requires. The defendant's right to decline to testify is an essential, constitutionally-rooted component of a fair trial under our criminal justice system. The real danger that a jury without proper guidance will use the decision of the defendant not to testify as evidence of guilt is a grave threat to the integrity of the fact-finding function. This danger undermines other fundamental constitutional principles such as the presumption of innocence and the prosecution's burden of proof of each element of the offense beyond a reasonable doubt. No other instruction given in a criminal trial, including instructions on the presumption of innocence and the burden of proof, specifically addresses the danger complained of here. In the absence of the protective instruction requested, the jury may fail to hold the prosecution to its burden of proof, the presumption of innocence could be improperly stripped away and the reasonable doubt standard diluted. While due process of law does not and should not require uniform instructions in criminal cases among the several states, it does and should require, as this Court has held, that a jury in a state criminal trial be given proper guidance regarding fundamental principles of constitutional law (even when the principles are not explicitly mentioned in the Constitution). It follows, *a fortiori*, that the Due Process Clause of the Fourteenth Amendment requires that the requested protective instruction be given because it is essential to proper jury guidance. (and thus the accuracy of the jury verdict), breathes life into an explicit, but normally unappreciated, constitutional guarantee, and prevents erosion of other basic principles which govern our system of trial by jury. In essence, the instruction is essential to a fair trial because of its purging effect.

The need for a particular instruction cannot generally be determined in a vaccum. However, petitioner would suggest that the requested instruction is so fundamental that its refusal in any case where the defendant declines to testify is violative of both the Fifth and Fourteenth Amendments without the need for further inquiry. Alternativley, examina-

tion of the record in this case reveals dramatic evidence of why the refusal to give the requested instruction violated the Federal Constitution. There was a continuing theme throughout petitioner's trial that he had consistently refused to explain himself to the police and, ultimately, to the jury. In the testimony of the police witnesses, in the statements and argument of both counsel, even in an item of physical evidence (the "waiver form"), reference was repeatedly made to Mr. Carter's "refusal" to answer questions at the time of his arrest and subsequent failure to testify. Furthermore, nothing in the voir dire by the court, arguments of counsel or other instructions given by the court adequately substituted for the requested instruction. Most significantly, the tendered instruction on the burden of proof was rejected. Instructions on other fundamental principles of law were sparse. It can't seriously be suggested that petitioner's reliance upon the Fifth Amendment did not enter the jury's deliberations. It was a principal issue in the trial. Finally, the danger complained of — that the jury will leap to the natural but wrong conclusion regarding the defendant's silence — is graphically illustrated by the record at bar. Contrary to the jury's undoubted assumption, petitioner declined to testify for reasons unrelated to his guilt or innocence. In the context of the totality of the circumstances of petitioner's trial, the refusal to give the requested instruction was violative of petitioner's federal constitutional rights.

Kentucky's rationale for refusing the requested instruction is based upon a belief that the requested instruction offends a statutory bar on comment upon the defendant's failure to testify and probably also upon an expressed preference for sparse instructions to juries. While the second rationale may be of arguable merit as a matter of policy, it is not a sufficient state reason to permit refusal of an otherwise constitutionally required instruction. The first rationale has been recently undermined by this Court. Furthermore, Kentucky's decisions on the issue presented have been inconsistent and the latest Kentucky position results from a misunderstan-

ding of what constitutes prohibited comment on the defendant's failure to testify.

While the degree of approval of a particular instruction among the various jurisdictions does not constitute a "due process acid test," the fact that the vast majority of Kentucky's sister states require an instruction regarding the defendant's failure to testify is strong support for petitioner's position. at least it is relevant, along with the position of scholarly authority, to the always difficult question of what due process requires.

In sum, the result requested here is an inexorable product of two independent constitutional principles as shaped by two separate lines of prior decisions by this Court. In this case, the unrelenting force of the Fifth Amendment privilege against compulsory incrimination and the Due Process Clause of the Fourteenth Amendment merge to require that upon request a state jury be given guidance regarding the defendant's failure to testify. In the absence of such a prophylatic instruction, the citizen's right to decline to testify will be eviscerated. Due to the explicit theme at trial of petitioner's silence, and since petitioner declined to testify for reasons unrelated to guilt, the refusal of the state trial judge to give the requested instruction so infected Mr. Carter's trial that he was denied due process of law.

ARGUMENT

THE STATE TRIAL COURT'S REFUSAL OF PETITIONER'S TIMELY REQUEST TO INSTRUCT THE JURY THAT "THE DEFENDANT IS NOT COMPELLED TO TESTIFY AND THE FACT THAT HE DOES NOT CANNOT BE USED AS AN INFERENCE OF GUILT AND SHOULD NOT PREJUDICE HIM IN ANY WAY," IN LIGHT OF THE FACTS OF THIS CASE, VIOLATED PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS AGAINST COMPULSORY SELF-INCRIMINATION AND TO DUE PROCESS OF LAW AS GUARANTEED BY THE UNITED STATES CONSTITUTION.

Introduction

"[T]he American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its essential mainstay." *Malloy* v. *Hogan*, 378 U.S. 1, 7 (1964). In simple terms, petitioner contends that the Fourteenth Amendment to the United States Constitution requires that the jury in a state criminal trial be informed regarding this "essential mainstay" of our system. The question presented, apparently the last remaining in this particular line of cases, is one which this Court anticipated, and specifically reserved, in *Griffin* v. *California*, 380 U.S. 609, 615 n.6 (1965), and again more recently in *Lakeside* v. *Oregon*, 435 U.S. 333, 337 (1978). It is a question which was resolved favorably to Carter's position by a unanimous Court on non-constitutional grounds over forty years ago. *Bruno* v. *United States*, 308 U.S. 287 (1939).

Petitioner presents here two independent, although overlapping, constitutional analysis in support of the desired result. The first finds its genesis in the Fifth Amendment, the second in the Due Process Clause of the Fourteenth Amendment. The first constitutional theory is supported by the rationale of *Bruno and Wilson* v. *United States*, 149 U.S. 60 (1892). It finds its later development in *Griffin* and recently in

Lakeside. The second thesis also begins with *Bruno* but takes a different track, finding support in various decisions of this Court and culminating in the recent decision in *Taylor* v. *Kentucky*, 436 U.S. 478 (1978). It is petitioner's contention that the result sought may be reached by a synthesis of the two constitutional concerns demonstrated by these distinct lines of authority. The first is the necessity to protect and breathe life into the Fifth Amendment privilege to decline to testify. The second concerns the demonstrated need to enhance the reliability of the jury trial by insuring that the fact-finder is given appropriate guidance regarding the fundamental principles which govern our system.

A. The prejudice inherent in providing no guidance to the jury when the defendant fails to testify constitutes a penalty imposed for exercise of the constitutional privilege and violates the Fifth Amendment.

"The privilege against self-incrimination . . . reflects many of our fundamental values and most noble aspirations . . ." *Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52, 55 (1964), quoting E. GRISWOLD, THE FIFTH AMENDMENT TODAY, 7 (1955). "[I]t is regarded as . . . [a] fundamental part of our constitutional fabric . . ." 378 U.S. at 56 n.5. In *Malloy* v. *Hogan*, 378 U.S. at 9 n.7, this Court again quoted Dean Griswold, *supra* at 73:

> I believe the Fifth Amendment is, and has been through this period of crisis, an expression of the moral striving of the community. It has been a reflection of our common conscience, a symbol of the America which stirs our hears.

In *Bruno* v. *United States*, 308 U.S. at 291, this Court agreed to decide the "important question in the administration of federal criminal justice" now presented in regard to state criminal trials. The petitioner in *Bruno* had requested an

instruction similar to that requested below.[7] *Id.* at 292. Mr. Justice Frankfurter wrote that the "narrow question before us is whether in these circumstances[8] Bruno had the *indefeasible right* . . ." to the "substance" of the instruction. *Id.* (emphasis added). This Court did not reach the Fifth Amendment issue but unanimously decided that a federal statute required that the "substance of the denied request should have been granted . . ." *Id.* at 294. The statute prohibited any presumption from arising from a criminal defendant's failure to testify.[9]

At common law, the defendant could not be compelled to furnish evidence against himself. On the other hand, he was not permitted to testify. *Wilson* v. *United States*, 149 U.S. at 65.[10] "This rule, while affording great protection to the accused against unfounded accusation, in many cases prevented him from explaining [incriminating] circumstances . . . To relieve him from this embarrassment the law was passed . . . he is by the act in question permitted . . . to testify . . ." *Id.* at 65-66. Following the enactment of 18 U.S.C. §3481 (1969), all states followed suit with laws of their own. Although the various statutes differed to some extent, all states permitted

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[7] The instruction was more thorough than Carter's tendered instruction. "The failure of any defendant to take the witness stand and testify in his own behalf, does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner." 308 U.S. at 291. While the phraseology of petitioner's requested instruction was more "conservative," it was certainly adequate and constitutionally accurate. *See Taylor* v. *Kentucky*, 436 U.S. at 488 n.16. See, e.g., Appendix C.

[8] The jury had already been instructed: "It is the privilege of a defendant to testify as a witness, if, and only when, he so elects . . ." 308 U.S. at 291.

[9] Act of March 16, 1878, now 18 U.S.C. § 3481 (1969), which states, in pertinent part: "In a trial of all persons . . . [the defendant] shall, at his own request, be a competent witness. His failure to make such a request *shall not create any presumption against him.*" (emphasis added).

[10] 8 J. WIGMORE, EVIDENCE § 2272 at 427 (McNaughton rev. 1961); Comment, 11 N.Y.L.F. 575, 576-577 (1965).

the defendant to testify and most (sometimes in separate statutes) prohibited any "inference" from his failure to do so.[11]

In *Wilson*, the issue before this Court was whether it was error under Section 3481 for the prosecutor to comment in argument on the defendant's failure to testify. This Court unanimously held that it was. "Nothing could have been more effective with the jury to induce them to disregard entirely the presumption of innocence to which by the law he was entitled . . ." *Id.* at 66. As in *Bruno*, however, this Court did not need to reach any Fifth Amendment issue. The question of whether adverse comment on the defendant's failure to testify in *state* criminal trials violates the defendant's Fifth and Fourteenth Amendment rights has arisen three times. In the first two cases, this Court assumed without deciding that the Fifth Amendment barred adverse comment by the trial judge and/or counsel so as to reach the larger question of whether the Fifth Amendment privilege was applicable to the states. *Twining* v. *New Jersey*, 211 U.S. 78, 114 (1908); *Adamson* v. *California*, 332 U.S. 46, 50 (1946).[12] In each case, this Court "adhered to the position that the Federal Constitution does not require the States to accord the Fifth Amendment privilege against self-incrimination." *Tehan* v. *Shott*, 382 U.S. 406, 412 (1966).

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[11] Dills, *The Permissibility of Comment on the Defendant's Failure to Testify in His Own Behalf in Criminal Proceedings, 3 WASH.L.REV. 161, 164-165 (1928). "In the United States* almost universal legislation decreed, in varying phraseology, that the inference shall not be availed of." WIGMORE, *supra* n.10. (emphasis in original). In Appendix B, petitioner has compiled relevant statutes from 43 jurisdictions. Most of these statutes (41) contain the "no inference" proviso (or the equivalent) common to Section 3481 and Kentucky's statute.

KRS 421.225, "Testimony of defendant" states: "In any criminal or penal prosecution the defendant on his own request, shall be allowed to testify in his own behalf, but his failure to do so *shall not be commented upon or create any presumption against him.*" (emphasis added).

[12] This Court was never required to reach the first question in the context of a federal criminal trial because the federal "no inference" statute prohibited adverse comment. *Wilson* v. *United States, supra*; *Adamson* v. *California*, 332 U.S. at 50 n.6.

Prior to the third occasion, this Court reexamined the applicability of the Fifth Amendment to the states. In *Malloy* v. *Hogan*, 378 U.S. at 8, this Court overruled *Twining* and *Adamson*:

> The Fourteenth Amendment secures against state invasion of the same privilege that the Fifth Amendment guarantees against federal infringement — the right of a person to remain silent unless he chooses to speak in the *unfettered exercise of his own will, and to suffer no penalty . . . for such silence.* (emphasis added).

The State of Connecticut argued that "the availability of the federal privilege . . . [should] be determined according to a less stringent standard than is applicable in a federal proceeding." *Id.* at 10. This Court disagreed. "The Court thus has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down version of the individual guarantees of the Bill of Rights . . .' " *Id.* at 10-11 (citation omitted). "It would be incongruous to have different standards determine the validity of a claim of privilege . . . depending on whether the claim was asserted in a state of federal court." *Id.* at 11.

Shortly after *Malloy*, this Court again considered a case presenting a question involving comment on the defendant's failure to testify. In *Griffin* v. *California*, 380 U.S. at 610, the trial judge informed the jury "that a defendant has a constitutional right not to testify." The jury was also warned that the defendant's failure "does not create a presumption of guilt nor by itself warrant an inference of guilt nor relieve the prosecution of any of its burden of proof." However, the instruction additionally permitted the jury to "take that failure into consideration' " The prosecutor "made much of the failure" of Mr. Griffin to testify in his summation. *Id.* This Court granted review in *Griffin* to consider whether "comment on the failure to testify violated the Self-Incrimination Clause of the Fifth Amendment." *Id.* at 611.

The *Griffin* Court noted that *Wilson* prohibited comment of this sort in federal trials, conceding that the decision rested

on the federal statute and not the Fifth Amendment. "But that is the beginning, not the end, of our inquiry." *Id.* at 613. After reviewing the *Wilson* decision, this Court stated, in a crucial passage: "*If the words 'Fifth Amendment' are substituted for 'act' and for 'statute' the spirit of the Self-incrimination Clause is reflected.*" *Id.* at 613-614 (emphasis added). *Griffin* condemned comment on the failure to testify as a remnant of the "inquisitorial system" prohibited by the Fifth Amendment. "It is a penalty imposed by courts for exercising a constitutional privilege. *It cuts down on the privilege by making its assertion costly.*" *Id.* at 614 (emphasis added).

The dissenting justices in *Griffin* disagreed, stating that "the California comment rule is not a coercive device which impairs the right against self-incrimination . . ." *Id.* at 622. Mr. Justice Stewart, jointed by Mr. Justice White, emphasized the protective nature of the California instruction, comparing it with the situation where the jury is "left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt. . . ." *Id.* at 621. The *Griffin* dissent apparently saw more danger in lack of jury guidance regarding the defendant's failure to testify than in reasonable comment upon it. Specifically referring to two Kentucky decisions in a footnote, Mr. Justice Stewart stated:

> . . . whenever in a jury trial a defendant exercises this constitutional right, the members of the jury are bound to draw inferences from his silence. No constitution can prevent the operation of the human mind. Without limiting instructions, the danger exists that the inferences drawn by the jury may be unfairly broad. *Some States have permitted this danger to go unchecked, by forbidding any comment at all upon the defendant's failure to take the witness stand. Id.* at 623 (emphasis added; footnote omitted).

Griffin was implicitly reaffirmend in *Lakeside* v. *Oregon*, *supra*, where the question presented was whether the giving of a "no inference" instruction over defense objection violated

the Constitution. In *Lakeside*, an instruction similar to that requested below was given despite trial counsel's complaint that his strategy was to avoid any mention of the defendant's failure to testify. This Court noted that the argument rested upon "two very doubtful assumptions."

> First, that the jurors have not noticed that the defendant did not testify and will not, therefore, draw adverse inferences on their own. Second, that the jurors will totally disregard the instruction, and affirmatively give weight to what they have been told not to consider at all. Federal constitutional law cannot rest on speculative assumptions so dubious as these. *Id.* at 340 (footnotes omitted).

In reaffirming *Griffin*, the *Lakeside* Court held that the Fifth Amendment barred only *adverse* comment on the defendant's failure to testify. A "protective instruction in the defendant's interest" is " 'comment' of an entirely different order. Such an instruction cannot provide the pressure on a defendant found impermissible in Griffin." *Lakeside* v. *Oregon*, 435 U.S. at 342, 339.

Petitioner submits that the natural end product of the precedents discussed is the result sought in this case. The combined effect of *Wilson, Bruno, Malloy, Griffin and Lakeside* leads to the conclusion that the state trial court's refusal to give the requested protective instruction violated the Fifth Amendment privilege against self-incrimination, applicable to Kentucky via the Due Process Clause of the Fourteenth Amendment. There are several compelling reasons why this is so. First, Section 3481 draws it strength from and does not enlarge upon the essence of the Self-Incrimination Clause. Therefore, as the same result was reached in *Wilson* (under the statute) and *Griffin* (under the Fifth Amendment), so the decision in the present case should be consistent with *Bruno*. Similar to what the *Griffin* Court did with the *Wilson* opinion, the words "Fifth Amendment" may be substituted for "Congress" in the Bruno decision. *See Griffin* v. *California*, 380 U.S. at 613-614. The opinion would read:

> The only way [the Fifth Amendment] . . . could provide that abstention from testifying should not tell against an

> accused was by an implied direction to judges to exercise their traditional duty in guiding the jury by indicating the considerations relevant to the latter's verdict on the facts . . . [The Fifth Amendment] could not have meant to legislate against the psychological operation of the jury's mind. It laid down cannons of judicial administration for the trial judge to the extent that his instructions to the jury, certainly when appropriately invoked, might affect the behavior of jurors. *Bruno* v. *United States*, 308 U.S. at 293 (citation omitted).

Holding that the failure to instruct as requested was no "technical error" which did not involve "substantial rights," the *Bruno* Court proclaimed that the issue presented was not "concerned with mere etiquette of trials and with the formalities and minutiae of procedure . . ."[13] *Id.* at 293-294. (Continuing with substitution for the word "Congress"), *Bruno* states: "Of a very different order of importance is the right of an accused to insist on a privilege which [the Fifth Amendment] . . . has given him." *Id.* at 294.

In *Lakeside*, this Court stated that *Malloy* v. *Hogan*, 378 U.S. at 11, "established that 'the same standards' must attach to the privilege 'in either a federal or state proceeding.' " 435 U.S. at 337. Once again, it follows that the decision in the case *sub judice* should be consistent with that in *Bruno*, which was decided on the basis of a statute designed to effectuate the Fifth Amendment privilege.[14] *See also Lakeside* v. *Oregon*, 435, U.S. at 343 n.1 (dissenting opinion, Stevens, J.).

It is extremely important to remember that at the time of the incorporation of the privilege against compulsory self-incrimination into the Bill of Rights, the defendant was not

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[13] It is worthy of note that the jury in *Bruno*, unlike petitioner's jury, had already been informed of the Fifth Amendment privilege. *See* n.8, *supra*. The trial judge had claimed: "I've already covered that." *Id.* at 292.

[14] *See* Note, 40 TULL.L.REV. 409, 416 (1966), where the author acknowledged that *Bruno* was based upon a federal statute but noted "the rationale of the decision seems equally applicable, and probably more compelling, under the fifth amendment."

permitted to testify. "This rule . . . afford[ed] great protection to the accused against unfounded accusation . . ." *Wilson* v. *United States*, 149 U.S. at 65. The prohibition against testimony by defendants, as did the privilege against compulsory self-incrimination, partially grew out of the excesses of the "Star Chamber" where the refusal to testify was tantamount to a confession.[15] When the various jurisdictions began to enact legislation permitting the testimony of the defendant, they met resistance from those who felt that this was a form of compulsory self-incrimination.[16]

> *It was feared that the granting of the capacity to testify standing by itself was self-incrimination.* Thus many states followed or accompanied their capacity statues with statutes forbidding comment on accused's failure to exercise this new right. Note, *Griffin* v. *California*: *Comment on Accused's Failure to Testify Prohibited by the Fifth Amendment*, 70 DICK. L. REV. 98, 100-101 (1965)(footnotes omitted; emphasis supplied).

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[15] The genesis of the Fifth Amendment privilege was in the excesses of the ecclesiastical courts, the Court of High Commission in Causes Ecclesiastical and the Court of Star Chamber. These courts attempted to use the oath *ex officio mero* to destroy heresy. Failure to give completely truthful testimony after the oath was given was punishable by death. "The theory of the Commission, which has been echoed today, was that an innocent man had nothing to hide . . . only the guilty defendant had reason to refuse the oath and could not thereafter claim injustice when convicted as if he had confessed." Gradually, the right against self-incrimination evolved. "In fact, the courts had become so concerned with protecting the right of the accused that the defendant was not permitted to testify on his own behalf. Note, *Prosecutorial Comment and Judicial Instruction on a Defendant's Failure to Testify: In Support of a Liberal Application of the Fifth Amendment*, 13 VAL. U. L. REV. 261, 263-265 (1979). *See Lilburn's Trial*, 3 How. St. Tr. (1637-45); WIGMORE, *supra* n.10, § 2250.

[16] *See State* v. *Cameron*, 40 Vt. 555, 565 (1867). An early critic of the statutes in question wrote, "although they profess to leave it to the accused to become a witness or not, they, in reality, force him to take the stand to protect himself from the inference of guilt which is almost sure to be drawn against him if he fails to do so, and the case calls for an explanation on his part." Maury, *Validity of Statutes Authorizing the Accused to Testify*, 14 AM.L.REB. 753, 762-763 (1880).

It really cannot be suggested that a jury does not notice a defendant's failure to testify. "[T]he jury will, of course, realize this quite evident fact, even though the choice goes unmentioned . . . a fact inescapably impressed on the jury's consciousness." *Griffin* v. *California*, 380 U.S. at 621, 622 (dissenting opinion). This Court made short work of this proposition in *Lakeside* v. *Oregon*, 435 U.S. at 340 n.10. "The layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime." 8 J. WIGMORE, EVIDENCE §2272 at 426 (McNaughton rev. 1961). Certainly, under the facts of this case the jury could not help but be totally aware of Mr. Carter's failure to take the witness stand. "In some trials, the defendant's silence will be like 'the sun . . . shining with full blaze on the open eye.' " *Lakeside* v. *Oregon*, 435 U.S. at 345 (dissenting opinion), quoting *State* v. *Cleaves*, 59 Me. 298, 301 (1871). In this sense, the same constitutional danger exists as was present in *Griffin*. Indeed, in the absence of any limiting instruction the danger to the Fifth Amendment privilege seems greater. *Griffin* v. *California*, 380 U.S. at 623 (dissenting opinion).

Lakeside also stands for the proposition that a protective instruction on the defendant's right not to testify can be of considerable benefit to a nontestifying defendant. 435 U.S. at 340.[17] Therefore, petitioner submits that a state trial court has an affirmative responsibility, upon proper request, to remove the danger that a jury will give evidentiary weight to the defendant's failure to testify. No adverse inference was possible from exercise of the privilege at the time of its incorporation into the Bill of Rights because the defendant was not permitted, *and therefore not expected*, to testify. A prophylactic instruction is now required to restore the original force of the privilege. Without an appropriate instruction, petitioner submits that the invocation of the privilege, at least in trials such as his own, becomes a meaningless exercise.

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[17] See Section "B" *infra*.

"*Griffin* stands for the proposition that the government may not add unnecessarily to the risk taken by a defendant who stands mute." *Lakeside* v. *Oregon*, 435 U.S. at 345 (dissenting opinion). Similarly, the trial court, by refusing a purging instruction, cannot increase "the pressure on a defendant found impermissible in *Griffin*." *Id.* at 339. If petitioner is to have a "free choice to admit, to deny, or to refuse to answer," *Lisenba* v. *California*, 314 U.S. 291, 241 (1941), and is "to suffer no penalty," *Malloy* v. *Hogan*, 378 U.S. at 8, the jury must be given proper guidance on the issue of the defendant's deafening silence. Untrammeled use by the jury of the natural, but incorrect, inferences from Carter's failure to testify violates the Fifth Amendment because "[u]sing a defendant's silence as evidence against him is one way of having him testify against himself." *Scott* v. *California*, 364 U.S. 471 (1960)(dissenting opinion, Douglas, J.).

Petitioner recognizes, of course, that the Fifth Amendment only prohibits "compelled" self-incrimination. *Cf. Jenkins* v. Anderson, _____ U.S. _____, 100 S.Ct. 2124, 2130 (1980)(concurring opinion, Stevens, J.), discussing prearrest silence. "Compulsion is the focus of the inquiry." *Griffin* v. *California*, 380 U.S. at 620 (dissenting opinion). However, physical torture is not the only type of constitutionally prohibited compulsion. *See e.g., Haynes* v. *Washington*, 373 U.S. 503 (1963). To the same or greater extent than in *Griffin*, the trial court's refusal to put a check on the jury's use of petitioner's silence "cut down on the privilege by making its assertion costly." *Griffin*, 380 U.S. at 614. A trial judge must provide protection for the exercise of the Fifth Amendment privilege even when, unlike the present case, it is improperly permitted to be claimed. *See Johnson* v. *United States,* 318 U.S. 189 (1942). Even pressure of a relatively subtle form can represent unconstitutional compulsion. In *Brooks* v. *Tennessee*, 406 U.S. 605 (1972), a state law[18] required a defendant

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[18] Kentucky was the only other state to have such a statute. KRS 421.225(2) (since repealed).

to testify first if he wished to testify at all. This Court held that, despite the defendant's failure to testify[19], the statute "exacts a price for his silence by keeping him off the stand entirely unless he chooses to testify first." As in *Brooks*, "A heavy burden [is cast on petitioner's]. . . . otherwise unconditional right not to take the stand." *Id.* at 610. The trial judge's refusal to lift that "heavy burden" from petitioner was constitutional error.

Accordingly, the state trial court's refusal to give a protective instruction regarding petitioner's Fifth Amendment right against compulsory self-incrimination extracted a substantial penalty for the exercise of the privilege by subjecting Mr. Carter to the real danger that the jury treated petitioner's failure to testify as evidence of guilt. The Fifth Amendment has been violated.

B. The prejudice inherent in refusing guidance to the jury when a criminal defendant declines to testify violates the Due Process Clause of the Fourteenth Amendment.

The protective instruction refused by the trial court below was not merely desirable or "universally" required but it dealt with a "right which was guaranteed to the defendant by the Fourteenth Amendment." *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973). The Fifth Amendment right is of such a fundamental nature that jury guidance on the privilege is essential to due process of law. The privilege against self-incrimination is not only "deemed desirable from the viewpoint of sound judicial practice . . ." it is actually "commanded by the Constitution." *Cupp* v. *Naughten*, 414 U.S. at 146.

The importance of instructions on the fundamental principles which govern criminal trials cannot be overstated.

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[19] Likewise, petitioner may legitimately claim a violation of the Fifth Amendment privilege despite the fact that he did not actually incriminate himself. *See Brooks* v. *Tennessee*, 406 U.S. at 612 n.6.

Clearly many citizens are woefully lacking in knowledge about the basic principles of our criminal justice system — especially in regard to the accused's right to remain silent and rely upon his presumption of innocence and the prosecutor's burden of proof. "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege."[20] *Ullman* v. *United States*, 350 U.S. 422, 426 (1965).

As discussed in Section "A", this Court has recently recognized that lay jurors will benefit from[21] and pay attention to an instruction "not to draw any adverse inference from . . . [the defendant's] decision not to testify." *Lakeside* v. *Oregon*, 435 U.S. at 334, 340. Similarly, in *Bruno* v. *United States*, 308 U.S. at 294, the "no inference" instruction was deemed "legally significant" and not "psychologically futile."

> Certainly, despite the vast accumulation of psychological data, we have not yet attained that certitude about the human mind which would justify us in . . . a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court that the failure of an accused to be a witness in his own cause "shall not create any presumption against him." *Id.*

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[20] A recent comprehensive national survey of public opinion conducted for the National Center for State Courts revealed the startling information that 37% of those interviewed believe that it is the accused's responsibility to prove his innocence. 64 ABAJ 653 (1978). Furthermore, when the interviewees were broke down by income groups, it was revealed that more than 50% of those with incomes under $10,000 believe that a defendant has the burden of proving his innocence. THE PUBLIC IMAGE OF COURTS (Reprinted from State Courts: A Blueprint for the Future) 10 (1978). "Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States." *Ullman* v. *United States*, 350 U.S. at 426427.

[21] Even a criminal defendant who has the advice of knowledgeable counsel and may have prior experience with the law must be informed on the record of his Fifth Amendment privilege by the trial judge. *Boykin* v. *Alabama*, 395 U.S. 238 (1969)

Research in the social sciences supports this Court's conclusion that "instructing a jury in the basic constitutional principles that govern the administration of criminal justice" is effective.[22]. *Lakeside* v. *Oregon*, 435 U.S. at 342. Our system is based upon the belief that jurors understand and follow the court's instructions on the law. "In a trial by jury . . . the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." *Quercia* v. *United States*, 289 U.S. 466, 469 (1932), quoting *Herron* v. *Southern P. Co.*, 283 U.S. 91, 95 (1930). "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." *Starr* v. *United States*, 153 U.S. 614, 626 (1893).

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[22] *See Reed, Jury Simulation: The Impact of Judge's Instructions and Attorney Tactics on Decisionmaking*, 71 J.CRIM.L. & CRIMINOLOGY 68 (1980). In the experiement reported by Reed subjects were divided into two groups, one group received instructions while the other did not. Both read summaries of trials. *Id.* at 69-70. Instructions "had a significant effect . . . Jurors were affected by judges' instructions." *Id.* at 71.

Another study provided evidence that individual jurors and juries as a whole retain and comprehend judges' instructions at a rather high level — much higher than many people in the legal field had anticipated. Forston, *Judge's Instructions: A Quantitative Analysis Analysis of Jurors' Listening Comprehension*, 18 TODAY'S SPEECH 34 (1970). Actual jurors have reported impressive understanding of the court's instructions. Bridgeman and Marlowe, 64 J. APPLIED PSYCH. 91, 97 (1979). Eighty-two percent of the jurors interviewed "said they either completely or mostly understood the judge's instructions to the jury when the trial ended."

Particularly significant to petitioner's case is an experiment which demonstrated that jurors "do take account of a judicial instruction to disregard similar convictions." Cornish & Sealy, *Juries and the Rules of Evidence*, 1973 CRIM.L.REV. 208, 217-218, 222. Jurors could thus be expected to follow an instruction to disregard the defendant's failure to testify.

See also R. SIMON, THE JURY: ITS ROLE IN AMERICAN SOCIETY 68 (1980), and Gerbosi, Zuckerman, and Reis, *Justice Needs a New Blindfold: A Review of Mock Jury Research*, 84 PSYCH. BULL. 323 (1977) for additional support for the proposition that jurors do heed the court's instructions.

In *Bollenbach* v. *United States*, 326 U.S. 607, 612 (1945), Mr. Justice Frankfurter wrote for the Court:

> Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria.

Proper jury guidance as to fundamental legal principles is essential to the integrity of the fact-finding function. It goes to the heart of the Sixth Amendment right to a jury trial applicable through the Due Process Clause of the Fourteenth Amendment. *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). "It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court." *Herron* v. *Southern P. Co.*, 283 U.S. at 95. ' "Trial by jury' . . . is not merely a trial by a jury of twelve men . . . it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law . . ." *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 13-14 (1899).

In determining whether a particular procedure offends the Due Process Clause, this Court has traditionally analyzed various factors to determine whether there has been a violation of "fundamental fairness." The "history" of the protection afforded the defendant regarding compulsory self-incrimination is relevant because it is "fundamental to our system of justice." *Duncan* v. *Louisiana*, 391 U.s. at 153-154. *See also Mullaney* v. *Wilbur*, 421 U.S. 684, 692-696 (1975); *In Re Winship*, 397 U.S. 358, 361 (1970). Also of relevance is the extent of "adherence" to the practice in "common law jurisdictions" including the practice of the states and federal courts. *See, e.g., Sandstrom* v. *Montana*, 442 U.S. 510, 514 n.3 (1979). The widespread insistence upon giving the requested instruction in federal (*Bruno*) and state courts is helpful in analyzing the due process nature of petitioner's claim.[23] The history and widespread use of the prophylactic

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[23] See Section "E", *infra*.

instruction in issue reflects "a profound judgment about the way in which . . . justice [should be] administered." *Duncan* v. *Louisiana*, 391 U.S. at 155.

In *Lakeside*, this Court captured the essence of petitioner's "due process" argument:

> The very purpose of a jury charge is to flag the jurors' attention to concepts that must not be misunderstood such as reasonable doubt and burden of proof. *To instruct them in the meaning of the privilege against compulsory self-incrimination is no different. Id.* at 340 (emphasis added).

In *Taylor* v. *Kentucky, supra*, this Court was asked to decide whether the Due Process Clause required that instructions be given on the presumption of innocence and the lack of evidentiary value of the indictment. Due process was found to require an instruction on the presumption of innocence because of the "salutary effect upon lay jurors. . . . [T]he ordinary citizen well may draw significant additional guidance from an instruction on the presumption of innocence." *Id.* at 484. Special emphasis was placed on the "purging" effect of the presumption of innocence instruction and the need to protect" . . . the accused's constitutional right to be judged solely on the basis of proof aduced at trial." *Id.* at 486. The same value can be attributed to the instruction that the jury should not consider a defendant's failure to testify. The average juror needs to be educated regarding this essential but unappreciated right. Second, the tendered instruction would have performed an important "purging" function by removing the issue of Mr. Carter's silence before and at trial.[24] Finally, it must be remembered that the protective instruction requested was designed to inform the jury of a *specific constitutional right*. In this sense, petitioner's claim that the Due Process Clause of the Fourteenth Amendment requires such an in-

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[24] See Section "C" *infra*.

struction is even more compelling than the similar claim in *Taylor*, where the dissenting opinion noted:

> *In this case the omission did not violate a specific constitutional guarantee, such as the privilege against compulsory self-incrimination. Id.* at 492 (dissenting opinion, Stevens, J.; emphasis added; footnote omitted).

Petitioner submits that it is a denial of due process of law in violation of the Fourteenth Amendment for a state court to deny a timely request for a protective instruction on the Fifth Amendment privilege when the defendant declines to testify. Further, petitioner suggests that the denial of due process is so fundamental that inquiry into the particular facts in the present case is unnecessary. *See Bruno* v. *United States*, 308 U.S. 293-294; *Bollenbach* v. *United States*, 326 U.S. at 614-615. Alternatively, an examination of the trial below will reveal why the requested instruction was essential and its refusal violative of the Fourteenth Amendment.

C. Refusal of the instruction protective of Mr. Carter's exercise of his Fifth Amendment privilege created an unacceptable risk that the jury improperly considered his failure to testify as evidence of his guilt and so infected his trial as to deny him due process of law.

A defendant's silence during trial, like his silence during custodial interrogation, is always "insolubly ambiguous" as it relates to guilt or innocence. *Doyle* v. *Ohio*. 426 U.S. 610, 617 (1976). Indeed a prime rationale of the Fifth Amdnement privilege is that a particular defendant may have reasons unrelated to his guilt or innocence for declining to testify.[25] This fact was recognized in this Court's decisions in *Wilson* v. *United States*, 149 U.S. at 66, and *Griffin* v. *California*, 380 U.S. at 613:

> It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him.

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[25] See discussion *supra* n.15. *See Lakeside* v. *Oregon*, 435 U.S. at 343 (dissenting opinion).

> Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudice against him. It is not every one, however honest, who would therefore willingly be placed on the witness stand.

Other "neutral" reasons why defendants might decline to testify are fear of impeachment by prior felony convictions or other damaging information not necessarily relevant to the charge being tried, *Griffin*, 380 U.S. at 615; hesitancy to "incriminate others who they either love or fear," *Lakeside* v. *Oregon*, 435 U.S. at 344 n.2; or poor appearance, obnoxious personality, lack of intelligence, tenuous emotional situation, or a different cultural background from the jury, etc., causing an inability to communicate effectively to the jury or otherwise leaving a poor impression.[26] *Id.* at 343.

The present case presents an excellent example of how the usual juror conclusion from the failure to testify can be inaccurate. Contrary to the jury's undoubted assumption, petitioner declined to testify due to a reason unrelated to guilt or innocence. Defense counsel made it clear that "the only reservation Mr. Carter might have about testifying would be his impeachment by the use of these previous offenses . . ." [A, 54]. It was only when the trial court ruled that petitioner could be impeached by the use of the *same prior felony convictions in issue during the recidivist portion of the trial* that petitioner told the trial judge he would not testify [A, 58].[27]

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[26] *See* Note, 62 MARQ. L. REV. 74, 81, 85-86 (1978): Note, 70 DICK.L.REV. *supra* at 116-117.

[27] Kentucky's procedure regarding impeachment by use of prior felony convictions is governed by *Cotton* v. *Commonwealth*, 454 S.W.2d 698 (Ky. 1970). A hearing must be held outside the presence of the jury to determine if the prior felony convictions are relevant to credibility, i.e., those that involve "dishonesty, stealing, and false swearing." *Id.* at 701. Discretion is vested in the trial judge who must consider various factors — ". . . prejudice to the witness — remoteness of prior conviction . . . type of crime . . . age and circumstances of defendant . . ." *Id.* at 701-702.

The effect of Judge White's ruling was to force petitioner to choose between not testifying in the first phase of his trial or testifying and being required to admit the prior convictions in issue in the recidivist phase.[28] This was a difficult choice indeed, for conviction as a first degree persistent felon carriers a *mandatory* ten year minimum sentence before parole eligibility.[29] Petitioner had good reason, apart from the question of

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The transcript does not reflect the exact number of "qualified" prior felonies on petitioner's record. However, it is quite clear that there were various convictions to choose from other than those listed in the persistent felon indictment [A, 57]. The trial judge declined to exercise his discretion and order the prosecutor not to impeach Carter with those prior convictions to be in issue in the event of a guilty verdict on the burglary charge [A, 58].

[28] Under Kentucky law, admission to prior felony convictions which form the basis of the persistent felon indictment is tantamount to a guilty plea to the recidivist charge. Kentucky employs a bifurcated procedure. KRS 532.080(1), *supra* n.2, permits "the court for good cause [to] discharge the [first phase] jury and impanel a new jury" for the enhancement trial. However, in *Brown* v. *Commonwealth*, 551 S.W.2d 557, 559-560 (ky. 1977), the Supreme Court of Kentucky refused to permit impanelling of a second jury as a matter of federal constitutional law or statutory discretion. "If [the defendant] elects to testify, what he says can be used against him in the second state . . ." *Id.* at 560. *Brown* was reaffirmed by the Court in the present case as the same issue was presented [A, 78-79].

[29] KRS 532.080(7), *supra* n.2. This mandatory ten year term before parole eligibility is the longest sentence of its kind in Kentucky. Even a convicted murderer is eligible after six years imprisonment. 501 K.A.R. 1:010 (1975). Because of this possibility and the trial court's rejection of the protective instruction, petitioner was, as his counsel stated for the record, ". . . between a rock and a hard place . . ." [A, 48].

Moreover, even in the absence of the more difficult situation faced by petitioner, criminal defendants generally may reasonably decline to testify based solely on fear of impeachment by prior felony convictions. In H. KALVEN & H. ZEISEL, THE AMERICAN JURY, 145-147 (1966), the authors detail the results of the study of the American jury system undertaken at the University of Chicago Law School. The defendant had a criminal record in 47% of the cases examined. *Id.* at 145. "[R]ecord is an important determinant of the defendant's decision to testify. If he has no record, he will elect not to testify in only . . . 9 percent of the cases; if he has a record this percentage rises to . . . 26 percent. Further, when the evidence is most favorable to the defendant . . . the defendant without a record testifies over 90 percent of the time . . . [W]hen the defendant has

guilt or innocence, to decline to testify.[10]

On the other hand, it is clear that the jury was fully aware that petitioner failed to testify and it is reasonable to conclude that the jury used this failure as evidence of guilt. Mr. Carter's refusal to explain himself to the police when apprehended under incriminating circumstances and failure to testify at trial was a consistent theme in the trial court. Petitioner's apparent "refusal" to offer any explanation, when an explanation could have been forthcoming, was not merely an undercurrent in the flow of the evidence, it was one of the principal issues at trial. Defense counsel's opening statement all but assured the jury that petitioner would testify. "I sup-

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a record . . . he elects to testify only 53 percent of the time, suggesting that here counsel sees no reason to disturb a favorable situation by the disclosure of the record." *Id.* at 146.

Admission of evidence of prior felony convictions to impeach a criminal defendant's credibility has been held to impose an unreasonable burden on his right to testify and, consequently, to be a denial of due process of law. *State* v. *Santiago*, 53 Haw. 254, 492 P.2d 657 (1971). Other courts have severely restricted this type of impeachment. *See, e.g., State* v. *McAboy*, 236 S,E.2d 431 (W.Va. 1977).

Even among authorities advocating the propriety of comment upon the defendant's failure to testify, it has been suggested that use of prior felonies to impeach the defendant should be prohibited. Note, *Comment on Defendant's Failure to Take the Stand*, 57 YALE L. J. 145, 152 (1947). *See* UNIFORM RULE OF EVIDENCE 23(4) (1953), allowing comment and UNIFORM RULE 21, prohibiting impeachment by prior convictions unless the defendant puts his character in issue.

[10] Although petitioner was convicted by the jury in the persistent felon trial below, conviction as a recidivist under Kentucky procedure is not a foregone conclusion. In essence, the persistent felon hearing is a "mini-trial" in which fundamental constitutional rights apply. *See Specht* v. *Patterson*, 386 U.S. 605, 609, 610 (1967). The Commonwealth is held to an exacting standard of proof of each element of the offense beyond a reasonable doubt. Convictions have been vacated for failure to prove a single element. *See, e.g., Adams* v. *Commonwealth*, 551 S.W.2d 561, 563-564 (Ky. 1977); *Crawley* v. *Kunzman*, 585 S.W.2d 387 (Ky. 1979). Kentucky also has a history of "jury nullification" in recidivist proceedings. "As disclosed in many decisions it has not been unusual for juries to disregard former convictions." *Coleman* v. *Commonwealth*, 276 Ky. 802, 125 S.W.2d 728, 729 (1939).

pose that most of you would issue a true bill if Mr. Ruff told you what he has just told you *and you didn't have a chance to hear what the defendant had to say for himself.*" [A, 16; emphasis added]. The principal witnesses at trial were police officers and both testified that petitioner refused to respond to police interrogation [A, 24, 42]. The "Miranda" waiver form was introduced into evidence with "Suspect refused to answer questions" written on it [A, 72; emphasis added.] Defense counsel began his closing argument ". . . I am sure you all right now are wondering well what has happened? Why didn't Mr. Carter take the stand and testify?" [A, 60]. The Commonwealth Attorney made numerous references to the evidence as "uncontradicted" and made various other comments alluding to petitioner's failure to testify[31] [A, 68].

This Court has stated that a claimed constitutional violation in the instructions must be examined in the contex of the entire trial. *Cupp* v. *Naughten,* 414 U.S. at 147. The totality of the circumstances detailed above demonstrates a compelling need for a "purging" instruction regarding petitioner's failure to testify because there was a "genuine danger that the jury would convict petitioner on the basis of . . . extraneous considerations, rather than on the evidence introduced at trial." *Taylor* v. *Kentucky*, 436 U.S. at 488. In this case "[t]he well-recognized and long-established function of the trial judge to assist the jury by . . . instructions" required that he act to

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[31] When a prosecutor refers to the state's evidence as "uncontradicted" and the defendant is the only person who could have contradicted it, courts generally conclude that the comment is an improper reference to the defendant's failure to testify. Annot., 14 A.L.R.3d 723, 730 (1967). One federal circuit court of appeals has held that such comment so clearly focuses the jury's attention on the defendant's failure to testify that it constitutes *per se* reversible error unless the judge interrupts, admonishes the jury and tells them that the prosecutor was guilty of misconduct. *United States* v. *Flannery*, 451 F.2d 880, 881-882 (1st Cir. 1971). Significantly, a "no inference" instruction can help to purge the prejudicial impact of implicit comments on the defendant's not testifying. *See, e.g., United States* v. *Warner*, 428 F.2d 730, 740 (8th Cir. 1970); *United States* v. *Ward*, 481 F.2d 185, 187-188 (5th Cir. 1973). *See* also Note, 70 DICK.L.REV. *supra* at 119-120.

prevent the jury from focusing on petitioner's failure to testify instead of upon the evidence. The trial court's failure to act upon timely request denied petitioner due process of law.

Of course, the claimed constitutional violation "must be viewed in the context of the overall charge." *Cupp* v. *Naughten*, 414 U.S. at 147. Although the jury was instructed that "[t]he law presumes a defendant to be innocent of a crime . . ." [A, 8], it is doubtful that this terse directive had any significant impact upon the issue of Mr. Carter's failure to testify. In fact, consideration by the jurors of a defendant's failure to testify tends to strip away the presumption of innocence from a defendant. *Wilson* v. *United States*, 149 U.S. at 66. In *People* v. *Britt*, 43 N.Y.2d 111, 371 N.E.2d 504, 506 (1977), the court emphasized that the failure to give a "no inference" instruction would undermine the presumption of innocence since "by drawing adverse inferences from a defendant's silence, a juror tears from him the presumption which the law has fashioned to serve as his shield." Similarly, West Virginia's Supreme Court has also recognized the close relationship between the right against compulsory self-incrimination and the presumption of innocence. *State* v. *McClure*, 253 S.E.2d 555, 557 (W.Va. 1979), citing Taylor in reaffiriming the importance of a "no inference" instruction.

The trial court's instructions do not mention that the prosecution bears the burden of proof. Instead, the jurors are instructed that they ". . . will find the defendant guilty if, and only if, [they] believe from the evidence beyond a reasonable doubt all of the following . . ." elements [A, 7]. The court refused to give petitioner's tendered instruction on the burden of proof which emphasized that the burden "aways rests upon the prosecution" and that petitioner was "under no obligation to prove anything" [A, 5]. There is no doubt that the Fifth Amendment privilege, the presumption of innocence, and the burden of proof are closely aligned. The right against compulsory self-incrimination ". . . is an expression of our conviction that the defendant in a criminal case must be presum-

ed innocent, and that the State has the burden of proving guilt . . ." *Lefkowitz* v. *Cunningham*, 431 U.s. 801, 810 (1977)(dissenting opinion, Stevens, J.; footnote omitted). However, to say that these principles are closely aligned is not to say that they do not serve distinctive functions. Petitioner's jury would have certainly derived "significant additional guidance" from an instruction that "no inference" should be drawn from his failure to testify. *Taylor* v. *Kentucky*, 436 U.S. at 484. The trial court's presumption of innocence instruction was "skeletal", *id.* at 486, and it is doubtful the jurors were adequately instructed on the burden of proof. Permitting to go unchecked the jury's consideration of petitioner's apparent "refusal" to testify likely led to the undermining of the presumption of innocence and the burden of proof, rather than the trial court's "Spartan instructions" performing any substitute purging effect.[32]

Of course, the beyond-reasonable-doubt standard is also an essential part of due process. *In Re Winship*, 397 U.S. at 363-364. In *Taylor*, however, Kentucky's reasonable doubt instruction was criticized as "truncated . . . [and] hardly a model of clarity." 436 U.S. at 486. Since that time, the instruction has neither been expanded nor clarified. The term "reasonable doubt" is no longer defined. KY. REV. STAT., R. CRIM. PROC. 9.56(2). Petitioner's jury was instructed to "find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty" [A, 8]. In the absence of an instruction informing the jury, in substance, that petitioner's failure to testify "is not evidence of his guilt," the reasonable doubt instruction most certainly did not accomplish removal of the danager complained of. Again, it

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[32] In contrast, petitioner's tendered but rejected burden of proof instruction may have performed a protective role, had it been given, especially as to the emphasis on the continuing burden of the prosecution and the absence of any burden on petitioner "to prove anything" [A, 5].

is more likely that the jury's consideration of Mr. Carter's failure to testify undermined the reasonable doubt standard by permitting consideration of ". . . other circumstances not adduced as proof at trial." *Taylor* v. *Kentucky*, 436 U.S. at 485, citing *Estelle* v. *Williams*, 425 U.S. 501 (1976). Since the Due Process Clause requires courts to "be alert to factors that may undermine the fairness of the fact-finding process" and to "carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt," petitioner has been denied a fair trial. 425 U.S. at 503.

Additionally, even had the trial court given the jury "healthy" instructions on the presumption of innocence, burden of proof and reasonable doubt, the tendered prophylactic instruction on petitioner's failure to testify was still necessary. In *United States* v. *Bain*, 596 F.2d 120 (5th Cir. 1979), the issue was whether a "no inference" instruction, very similar to that requested below, should have been given. An extensive burden of proof/reasonable doubt instruction was used. Relying on *Taylor*, the Fifth Circuit noted that ". . . the requested charge gives the jury additional guidance to which the defendant is entitled." 596 F.2d at 122. In the present case, there was a "special purpose" and a "particular need for" the requested instruction. *Taylor* v. *Kentucky*, 436 U.S. at 488.

Furthermore, there was nothing in the voir dire of the court which could have substituted for the requested charge.[11]

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[11] In Kentucky a defendant has no right to inquire of prospective jurors during voir dire about their adherence to the Fifth Amendment privilege. *Wilson* v. *Commonwealth*, 601 S.W.2d 280, 283 (Ky. 1980)(issue rejected *sub silentio*, see Brief for Appellant at 22-23). It has been hled in federal court that inquiry on voir dire about the effect on the jurors of the defendant's failure to testify was unnecessary because the trial court elicited that the jurors would follow the instructions and subsequently gave them a "no inference" instruction. *United States* v. *Goodwin*, 470 F.2d 893, 897 (5th Cir. 1973). However, in Kentucky a defendant has a right to neither voir dire nor an instruction on the privilege . . .

Nor did counsel's argument have any purging effect.[14] In the absence of support from the trial judge, defense counsel's argument, that petitioner "doesn't have to take the stand . . . doesn't have to do anything" [A, 60], likely was rejected as inaccurate and possibly dismissed as arrogance. "[A]rguments of counsel cannot substitute for instructions by the Court." *Taylor* v. *Kentucky*, 436 U.S. at 489.

In sum, neither the instructions as a whole nor the voir dire nor final argument by counsel filled the void created by the refusal of the protective charge on petitioner's right not to testify. *Compare Henderson* v. *Kibbe*, 431 U.s. 145, 153 (1977); *see Cupp* v. *Naughten*, 414 U.S. at 142-143, 147-148, 149, where "twice, explicit instructions [were given] affirming the presumption of innocence and declaring the obligation of the State to prove guilt beyond a reasonable doubt . . . [T]he State's burden of proof was emphasized and re-emphasized . . . Furthermore . . . the instructions freed respondent from any undue pressure to take the witness stand himslef . . ." Indeed, in *Cool* v. *United States*, 409 U.s. 100, 104 (1972), a constitutional violation was found in an instruction because it "substantially reduce[d] the Government's burden of proof." However, the "trial judge repeatedly emphasized to the jury that the Government was obligated to prove guilt beyond a reasonable doubt." *Id.* at 106 (dissenting opinion, Rehnquist, J.). In the present case, the paucity of guidance for the juror on crucial issues is striking. A review of the other "components of the trial" below clearly demonstrates that the

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[14] Despite defense counsel's argument to the jury below, it is the law of Kentucky that no one may "comment" upon the defendant's failure to testify, including defense counsel, even in an attempt "to explain why . . . [his client] had not taken the stand . . ." *Collins* v. *Commonwealth*, 396 S.W.2d 318, 319-320 (1965).

It is also noteworthy that the Supreme Court of Kentucky, in Carter's appeal, stated: "The comments of the appellant's attorney were an invitation to attack, which [the prosecutor] did" [A, 78]. It is fairly clear that defense counsel cannot adequately deal with the problem of the inference from his client's failure to testify in Kentucky without assistance from the trial court.

"testimony of witnesses, arguments of counsel, receipt of [the] exhibits[s] in evidence, and instruction of the jury by the judge" magnified rather than minimized the prejudice inflicted on Lonnie Joe Carter by the refusal of the protective instruction regarding his Fifth Amendment privilege. The refusal to so instruct the jury "so infected the entire trial that . . . [petitioner's] conviction violates due process." *Cupp* v. *Naughten*, 414 U.S. at 147.

D. The decision below conflicts with *Lakeside* v. *Oregon*, *Taylor* v. *Kentucky*, and previous decisions of the Kentucky Supreme Court and is not based on any substantial state interest.

Kentucky's Supreme Court rejected petitioner's claim that he was entitled to a "no inference" instruction on the basis of *Green* v. *Commonwealth*, Ky., 488 S.W.2d 339, 341-342 (1972). The Kentucky court has considered this issue on many occasions with varying results. The earliest decision on the topic is *Tines* v. *Commonwealth*, 25 Ky.L.Rep. 1233, 77 S.W. 363 (1903). In *Tines* the court condemned an instruction to the jury that it should not comment upon or draw any presumption of guilt from the defendant's failure to testify. *Id.* at 364. Remarking that the instruction directed the jury's attention to the defendant's failure to testify and was equivalent to a remark by the prosecutor, Kentucky's highest court required "absolute silence" on the failure to testify. *Id.*

The next few decisions on point adhered to the principle espoused in *Tines*. *Armstrong* v. *Commonwealth*, 190 Ky. 217, 227 S.W. 162, 163-164 (1921); *Hanks* v. *Commonwealth*, 248 Ky. 203, 58 S.W.2d 394, 395 (1933); *Roberson* v. *Commonwealth*, 274 Ky. 49, 118 S.W.2d 157, 158 (1938). However, in *Kelley* v. *Commonwealth*, 300 Ky. 136, 187 S.W.2d 796, 800 (1945), the court held that "it would have been better" for the trial court to have given the "no inference" instruction requested by the defendant but found that the omission was not prejudicial in that case. The court

reiterated that holding of *Kelly* in *Hooper* v. *Commonwealth*, 371 S.W.2d 646, 648 (1963) but concluded that a *sua sponte* instruction was unnecessary. All these cases were decided under statutes virtually identical to KRS 421.225.

The issue was again addressed in *Spencer* v. *Commonwealth*, 467 S.W.2d 128, 131 (ky. 1971). Kentucky's highest court, citing *Kelly* v. *Commonwealth* and *Spencer* v. *Commonwealth*, both *supra*, construed KRS 421.225 as requiring, upon proper request, a "no inference" instruction:

> Although our Kentucky Constitution does not specifically safeguard to the defendant an instruction on his failure to testify, we are of the opinion that in view of KRS 421.225(1) the defendant is entitled to an instruction when properly requested. *Id.* at 131.

However, relying on *Hopper* v. *Commonwealth*, *supra*, the court held that a *sua sponte* instruction was not required.

Subsequently, the Kentucky court again changed its position. It repudiated the language in *Spencer* v. *Commonwealth*, *supra*, as mere dictum. *Scott* v. *Commonwealth*, 495 S.W.2d 800, 802 (Ky. 1973). The court's reasoning was explained in *Green* v. *Commonwealth*,[35] *supra* at 341:

> . . . the requested "no inference" instruction . . . would have been direct "comment" by the court and would have emphasized the fact that the accused had not testified in his own behalf.

The court stated further that a "no inference" instruction "would do violence to the clear intent of our legislature to fully protect the rights of an accused standing as a defendant on trial." *Id.* at 341342.

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[35] In *Green*, the court distinguished *Bruno* v. *United States*, *supra*, because the federal statute does not contain the "no comment" provision included in KRS 421.225. As petitioner will explain in Section "E", the great majority of the twentythree states with statutes containing a "no comment" clause require, explicitly or implicitly, a "no inference" instruction on request. That is so because "no comment" means "no *adverse* comment."

Obviously, the Kentucky Supreme Court has vacillated on the question of a defendant's right to a "no inference" instruction. It is significant that at all times the statute in effect was virtually identical. In its very early and most recent decisions the court reasoned that any mention by the trial court of the defendant's failure to testify equalled adverse comment. Contrastingly, the court apparently concluded that the instruction effectively implemented the statute prohibiting the failure to testify from creating any presumption against a defendant in *Kelly* v. *Commonwealth*, *Hooper* v. *Commonwealth* and *Spencer* v. *Commonwealth*, all *supra*.

The rationale that a "no inference" instruction equals adverse comment on the defendant's failure to testify was specifically rejected by this Court in *Lakeside* v. *Oregon*, *supra*. In *Lakeside*, this Court spoke of the purpose of the requested protective instruction.

> . . . its very purpose is to remove from the jury's deliberations any influence of unspoken adverse inferences. It would be strange indeed to conclude that this cautionary instruction violates the very constitutional provision it is intended to protect. *Id.*, 435 U.S. at 339.

Petitioner submits that the position of the Kentucky Supreme Court is based upon what this Court called two "very doubtful . . . speculative . . . [and] dubious . . ." assumptions-that jurors will not notice that a defendant does not testify and that they will ignore the court's "no inference" instruction. *Id.*, 435 U.S. at 340. *See* also *Bruno* v. *United States*, 308 U.S. at 294, where this Court refused to accept the proposition that jurors would not heed the court's instructions. The rationale behind the decision of Kentucky's court in petitioner's case is thus in direct conflict with this Court's holding in *Lakeside*.

Kentucky has articulated only a single state interest in refusing a requested "no inference" instruction — protection of the defendant who has declined to testify. That concern is obviously misplaced as this Court has explained in *Lakeside*.

However, another state policy — a preference for sparse instructions to juries — is no doubt also involved in the court's refusal of the prophylactic instruction. "From time immemorial the emphasis with regard to jury instructions in this state has been placed on simplicity." *Whorton* v. *Commonwealth*, 570 S.W.2d 627, 631 (Ky. 1978), *rev'd per curiam*, 441 U.S. 786 (1976). Referring to this Court's observation in *Taylor* v. *Kentucky*, 436 U.S. at 486, that the trial court's instructions were "skeletal" and "Spartan," Kentucky's highest court said that description "was more of a compliment than a slur" and emphasized that instructions ought to provide "only the bare bones." *Whorton* v. *Commonwealth* 570 S.W.2d at 632.

While there may be merit to Kentucky's position that instructions should be as few and as simple as possible, such a state interest certainly is not substantial enough to override petitioner's interest in the prophylactic instruction he requested to effectuate his Fifth Amendment privilege. This Court recognized, at least implicitly, that the balance between a state's wish to limit its instructions and a defendant's request for a protective instruction must tip in favor of the defendant's constitutional rights in *Taylor* when it held that Taylor was denied due process by the trial court's failure to instruct on the presumption of innocence. Kentucky's decision in petitioner's case is, therefore, in conflict with *Taylor*.

Petitioner notes that when a penalty on the Fifth Amendment privilege is involved this Court has held that even a substantial state interest must be subordinated to the defendant's right to remain silent. In *Brooks* v. *Tennessee*, 406 U.S. at 611, the state's important interest in preventing a defendant from coloring his testimony to conform to what other witnesses have said previously had to give way to the defendant's intelligent exercise of his Fifth Amendment privilege. "Pressuring the defendant to take the stand, by foreclosing later testimony if he refuses, is not a constitutionally permissible means of ensuring his honesty." *Id.* Likewise, omitting a prophylactic instruction on the defen-

dant's invocation of his Fifth Amendment privilege is not a "constitutionally permissible means" of effectuating any state interest in "bare bones" instructions.

Finally, petitioner notes that Kentucky's interest in precluding a non-testifying defendant from having a "no inference" instruction given to the jury is not substantial because even Kentucky's highest court has taken various positions on whether the instruction is necessary. Thus there obviously is no compelling state policy involved here.

The conflict of the Kentucky court's decision in petitioner's case with *Lakeside*, *Taylor* and its own previous decisions and the absence of any substantial state interest in precluding a requested "no inference" instruction strongly indicates that petitioner's conviction should be reversed.

E. The vast majority of other authorities support the need for the protective instruction requested and this is persuasive on the federal constitutional question presented.

It is unquestionably helpful to review the policies of the various states and the writings of legal scholars on the question of a non-testifying defendant's right to a "no inference" instruction in determining what the federal constitutional right to due process requires. Significantly, this Court has endorsed surveying the views of the states on a particular topic to assist in fleshing out the mandates of the Due Process Clause. *In Re Winship*, 397 U.S. at 374. *See* also *Mullaney* v. *Wilbur*, 421 U.S. at 696, 701. The nearly universal acceptance of a rule of law by the states certainly establishes its value to a defendant. *Beck* v. *Alabama*, _____ U.S. _____, 100 S.Ct. 2382, 2388-2389 (1980).

Furthermore, in the landmark case on comment regarding a defendant's failure to testify, *Griffin* v. *California*, 380 U.S. at 611 n.3, this Court noted that "the overwhelming consensus of the States, however, is opposed to allowing comment on the defendant's failure to testify." Carter thus submits

that if most states require that the jury be instructed on defense request that the defendant has the right not to testify and that they can draw no inference against him for his failure to testify, it is reasonable to conclude that such an instruction is essential to a fair trial.

Significantly, the overwhelming majority of states regard the "no inference" instruction as a basic protection for the defendant who chooses to exercise his Fifth Amendment privilege. More than forty states have statutes which preclude a defendant's failure to testify from being used against him.[36] Kentucky's statute (KRS 421.225) which provides that a defendant's failure to testify "shall not . . . create any presumption against him" is typical. Furthermore, over half of those states specifically prohibit by statute or rule comment on the absence of testimony by the defendant.[37] Once again, KRS 421.225, stating that a defendant's failure to testify "shall not be commented upon" is typical. And seven states have included in their laws a specific requirement that the trial court instruct the jurors that theymay not draw unfavorable inferences from a defendant's not testifying.[38] For example, CONN.GEN.STAT.ANN. §54-84 (West 1958) provides that "the court shall instruct the jury that they may draw no unfavorable inferences from the accused's failure to testify" unless the defendant objects.

Most striking is the fact that forty-one of the forty-six jurisdictions surveyed[39] require, explicitly or at least implicitly, a "no inference" instruction.[40] Of the five states which pro-

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[36] See Appendix B.

[37] See Appendix B.+

[38] See Appendix A-I and Appendix B.++

[39] No case, statute or pattern instruction on the necessity for a "no inference" instruction was located for Alaska, Delaware, Montana or Rhode Island, Petitioner asserts that this void most likely indicates that the instruction is routinely given on request in those states. If it were not, defendants would almost certainly have litigated the issue.

[40] See Appendix A-I and Appendix A-II.

hibit the instruction,[41] Kentucky, Minnesota, Oklahoma and Wyoming apparently reason that the instruction constitutes adverse comment which is harmful to the defendant.[42] Of course, this Court rejected that reasoning in *Lakeside* v. *Oregon*, 435 U.S. at 338-339. Nevada is unique in prohibiting by statute a "no inference" instruction but requiring an instruction that a defendant cannot be compelled to testify. NEV.REV.STAT. §175.181(1)(1979). Thus the handful of states that still preclude a "no inference" instruction have failed to articulate any persuasive rationale for their decisions.

There has been a definite trend over the years toward approval by the states of the "no inference" instruction. A striking recent example is Connecticut. In 1976 the Connecticut Supreme Court strongly condemned the prophylactic instruction in *State* v. *Branham*, 171 Conn. 12, 368 A.2d 63, 64-65 (1976). The court stated that silence on the topic of absence of the defendant's testimony was all that was required. *Id.* It further held that a "no inference" instruction was *too favorable to the defendant* and would permit him to use the Fifth Amendment "shield" as a "weapon". The next year the Connecticut legislature amended CONN.GEN.STAT.ANN. §54-84 (West 1958) by adding §54-84(b) which requires that, unless the accused requests otherwise, the court must inform the jury that it may draw no unfavorable inferences from a defendant's failure to testify.

Georgia, Ohio and Missouri are other examples of this trend. In *Linder* v. *State*, 132 Ga.App. 624, 208 S.E.2d 630 (1974), the Georgia appellate court held that a "no inference" instruction constituted comment on the defendant's failure to testify which the Georgia statute forbids and thus reversed the

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[41] See Appendix A-III.

[42] Minnesota's Supreme Court has recognized that the instruction may be necessary in some cases to prevent "manifest injustice." *State* v. *Grey*, 256 N.W.2d 74, 77-78 (Minn. 1977). Certainly, petitioner's case presents such a situation.

defendant's conviction. *Id.* at 632. However, in *Woodard* v. *State*, 234 Ga. 901, 218 S.E.2d 629 (1975), the Georgia Supreme Court disavowed the reasoning in *Linder* and held that a defendant is entitled to a protective instruction on request.[43]

> The language in such Code section that no comment shall be made because of such failure to testify must be construed in accordance with the first provision of such sentence, to wit; the failure to testify shall create no presumption against a defendant. Thus construed, what is prohibited is a comment that the defendant could have "denied," "explaines," or otherwise "disputed" the State's case against him. The forbidding of such comment would have nothing to do with a charge that the jury is to "make no assumption or draw any conclusions from the defendant's failure to testify." *Id.* at 632.

Compare State v. *Senzarino*, 224 N.E.2d 389, 393-398 (Ct.Common Pleas Ohio 1967), aff'd,15 Ohio App.2d 115, 239 N.E.2d 100, 105-106 (1968), *with State* v. *Nelson*, 36 Ohio St.2d 79, 303 N.E.2d 865, 869 (1973). Also *compare State* v. *Denison*, 352 Mo. 572, 178 S.W. 2d 449, 455 (1944), *with* MO.ANN.STAT., SUP.CT.R., R.CRIM.PROC.27.05.

The reasoning of the Georgia Supreme Court in *Woodard* v. *State*, *supra*, is compelling. The Georgia "no comment" statute, GA.CODE ANN. §38-415 (1974), is basically identical to Kentucky's. And that court has concluded that "no comment" must be interpreted as "no *adverse* comment" because of the statute's "no presumption" provision, which is also like Kentucky's. The Georgia court's reasoning is apparently accepted by many other courts since the vast majority of the states which prohibit comment by statute do require, explicitly or at least implicitly, a "no inference" instruction on request.[44]

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[43] *See also Clay* v. *State*, 236 Ga. 398, 224 S.E.2d 14 (1976).

[44] See Appendix A-I, Appendix A-II, Appendix A-III and Appendix B. Twenty-three states prohibit comment by statute. Eighteen of those permit or require a "no inference" instruction on request. Three, including Kentucky, prohibit such an instruction. No decision on the subject could be located for Delaware or Rhode Island.

Various states have described the prophylactic instruction in question as an essential one inextricably linked to the Fifth Amendment privilege against self-incrimination. The Alabama Supreme Court emphasized in *Perry* v. *State*, 368 So.2d 310, 312 (Ala. 1979) that the statute prohibiting the failure to testify from creating any presumption against a defendant "is so inexorably tied to the fundamental right against self-incrimination as to defeat any application of the harmless error doctrine." Remarking that "the denial of the requested instruction is tantamount to the denial of the fundamental right of the accused, as constitutionally and statutorily mandated, to elect not to testify," that court rejected the notion of analyzing each case in which the instruction was denied to determine whether the substantial rights of the accused had been violated in favor of an automatic reversal rule.

The New York Court of Appeals has also rejected application of a harmless error test to the refusal to tender to the jury a requested "no inference" instruction. *People* v. *Britt*, supra at 505. The court observed, "[h]ow diluted the exercise of this right would become if the jury were permitted to presume guilt on the basis of a defendant's refusal to testify." *Id.* at 506.

The Appellate Division of the New Jersey Superior Court has emphasized that the Fifth Amendment privilege would be destroyed if it were penalized by refusing a defendant's request for the prophylactic instruction in question. *State* v. *Smith*, 100 N.J. Super. 420, 242 A.2d 49, 51 (1968). See also *State* v. *McNeil*, 164 N.J.Super. 27, 395 A.2d 549, 551 (1978), where the court described the refusal of a requested "no inference" instruction as "clear constitutional error."

The only way to implement a statute's "no presumption" provision is to instruct the jurors that they may draw no inference from the defendant's failure to testify. *State* v. *Landry*, 85 Me. 95, 26 A. 998, 999 (Me. 1892). "The natural inclination of jurors would lead them to adopt the very presumption which the statute was designed to prevent." *Id.*

See Lakeside v. *Oregon*, 435 U.S. at 340. Unquestionably, Mr. Carter's failure to testify "was obvious and the jury could not help but be aware of it." *State* v. *Cook*, 182 Neb. 684, 157 N.W.2d 151, 155 (1968). A "no inference" instruction was thus an essential protection.

Even the Ohio Supreme Court, while noting that the Ohio Constitution and statutes permit both comment on and negative inferences from a defendant's failure to testify,[45] has held that a "no inference" instruction is under certain circumstances essential to a fair trial and the failure to give it may constitute reversible error. *State* v. *Nelson*, *supra* at 869.

Unquestionably, Kentucky is in a very small and dwindling minority of states in insisting that a "no inference" instruction constitutes prohibited "comment" on the failure to testify. *Green* v. *Commonwealth*, *supra*. Most of the states with "no comment" provisions like Kentucky's in their statutes or rules require a "no inference" instruction on request. This is so because "comment" means the "adverse comment" condemned by *Griffin* v. *California*, supra. The prophylactic instruction requested by petitioner implements the Fifth Amendment privilege and the closely related statutory prohibition against a defendant's failure to testify creating a presumption unfavorable to him. The views of the vast majority of the states are strong support for the thesis that the instruction tendered by petitioner and refused by the court was essential to a fair trial in accordance with the Due Process Clause of the Fourteenth Amendment.

Furthermore, the weight of scholarly authority supports petitioner's claim that he was entitled to a "no inference" instruction after declining to testify. This Court has considered the views of the community of legal scholars in determining whether a particular practice should be considered a fundamental right. *See Taylor* v. *Kentucky*, 436 U.S. at 483-484.

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[45] The court recognized that those provisions have been "banished" by *Griffin* v. *California*, *supra*. *State* v. *Nelson*, *supra* at 868.

Note, 40 TUL.L. REV. 409, 416 (1966), contains an excellent analysis of the reasons why a prophylactic instruction on the defendant's failure to testify is required by the Fifth Amendment.

Clearly, ". . . the trial court's refusal to so instruct should be constitutional error." Marcus-Wyner and King, *Courtroom Comment On An Accused's Reliance On The Privilege Against SelfIncrimination: California's Application Of Griffin* v. *California*, 9 U.CAL.D.L.REV. 603, 627 (1976). Another commentator has "submitted that the Court should extend the fifth amendment prohibition on comment so as to include the right of a defendant to a jury charge that his failure to testify does not create an inference of guilt." Note, 70 DICK.L.REV. *supra* at 119.

An important question was posed in 28 GEO.L.J. 417, 419 (1939):

> We might ask, in the absence of an instruction on the point what is to prevent a juryman from pressing it upon his fellow jurors?

The author emphasized that because the average juror "believes the defendant stamped with guilt because of his failure to testify, it would appear doubly vital that the jury be instructed that the law *forbids* the entertainment of such a belief." *Id.* at 418 (emphasis the author's). *See* also Soisson, *Comment To The Jury On Defendant's Failure To Testify*, 64 DICK.L.REV. 164, 166, 169, 171-172 (1960); 38 MICH.L.REV. 1322 (1940). The decisions of the great majority of states as well as the opinions of legal scholars clearly support Mr. Carter's claim that he was entitled by the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment to a protective instruction after he declined to testify at his trial.

CONCLUSION

For the reasons stated above, Lonnie Joe Carter respectfully requests this Court to reverse the decision of the Supreme Court of Kentucky affirming his conviction.

Respectfully submitted,

KEVIN MICHAEL MCNALLY
ASSISTANT PUBLIC ADVOCATE
STATE OFFICE BUILDING ANNEX
Third Floor
Frankfort, Kentucky 40601
(502) 564-5255

Counsel For Petitioner

M. GAIL ROBINSON
ASSISTANT PUBLIC ADVOCATE
STATE OFFICE BUILDING ANNEX
Third Floor
Frankfort, Kentucky 40601
(502) 564-5226

Of Counsel

Counsel express their appreciation for the invaluable assistance of J. Vincent Aprile II, Joyce Gayles, Melanie Kelley, JoEllen McComb and Patsy Shryock.

APPENDIX

APPENDIX A. JURISDICTIONAL SURVEY

I. States Which Require That A "No Inference" Instruction Be Given On Defense Request

State	Case(s), and/or Statute or Rule
1. Alabama	*Perry* v. *State*, 368 So.2d 310 (Ala. 1979) [No harmless error test]
2. Arizona	*State* v. *Piper*, 113 Ariz. 390, 555 P.2d 636, 639 (1976) *State* v. *Dean*, 447, P.2d 890, 894 (Ct.App.Ariz. 1968)
3. Arkansas	*Powell* v. *State*, 471 S.W.2d 333, 338 (Ark. 1971)*
4. California	*People* v. *Preston*, 107 Cal.Rptr. 300, 508 P.2d 300, 306 (1973) *People* v. *Gaulden*, 36 Cal.App.3d 942, 111 Cal.Rptr. 803, 811 (1974) CAL.EVIDENCE CODE §913 (Deering 1966)
5. Colorado	*Kimmel* v. *People*, 473 P.2d 167 (Colo. 1979)*
6. Connecticut	CONN.GEN.STAT.ANN. §54-84 (West 1958) (see Appendix B)
7. Georgia	*Clay* v. *State*, 236 Ga. 398, 224 S.E.2d 14 (1976)
8. Hawaii	*State* v. *Baxter*, 454 P.2d 366, 367 (Haw. 1969)*
9. Illinois	*People* v. *Greben*, 352 Ill. 582, 186 N.E. 162, 167 (1933) *People* v. *Lee*, 44 Ill.App.3d 43, 357 N.E.2d 888 (1978)**

10. Indiana	*Lyda* v. *State*, 395 N.E.2d 776, 780-781 (Ind. 1979) IND.CODE.ANN. 35-1-31-3 (Burns 1979)(see Appendix B)
11. Iowa	*State* v. *Osborne*, 139 N.W.2d 177, 178-179 (Iowa 1965)
12. Kansas	*State* v. *Goff*. 61 P. 683 (Kan. 1900) *State* v. *Perry*, 223 Kan. 230, 573 P.2d 989, 990 (1977)* KAN.STAT. §60-439 (1976)(see Appendix B)
13. Maine	*State* v. *Landry*, 85 Me. 95, 26 A. 998 (1892) *State* v. *Girard*, 283 A.2d 462, 464 (Me. 1971)*
14. Maryland	*Pearson* v. *State*, 28 Md.App. 196, 343 A.2d 916, 920 (1975)*
15. Michigan	*People* v. *Provost*, 144 Mich. 17, 107 N.W. 716 (Mich. 1906) *People* v. *Potts*, 55 Mich.App. 622, 223 N.W.2d 96, 101-102 (1974)*
16. Mississippi	*Funches* v. *State*, 125 Miss. 140, 87 So. 487, 488 (Miss. 1921)
17. Missouri	MO.ANN.STAT. SUP.CT.R., R.CRIM.PROC. 27.05 (see Appendix B)

18. New Jersey	*State* v. *McNeil*, 164 N.J.Super. 27, 395 A.2d 549, 551 (1978)** *State* v. *Smith*, 100 N.J. Super. 420, 242 A.2d 49, 50-51 (1968) *State* v. *DeStasio*, 49 N.J. 247, 229 A.2d 636, 638-639 (1967)
19. New Mexico	*State* v. *Spearman*, 84 N.M. 366, 503 P.2d 649, 651-652 (1972) *State* v. *Buchanan*, 76 N.M. 141, 412 P.2d 565, 567 (1966)[dictum about instruction being favorable to defendant] N.M.STAT.ANN,REV., R. 513 (1978)
20. New York	*People* v. *Britt*, 43 N.Y.2d 111, 371 N.E.2d 504, 506 (1977)[no harmless error test] N.Y.CRIM.PROC.LAW §300.10(2)(Consol. 1979)(see Appendix B)
21. North Carolina	*State* v. *Davis*, 241 S.E.2d 656, 660 (N.C. 1978)*
22. Oregon	*State* v. *Hale*, 537 P.2d 1173 (Ct.App.Ore. 1975)
23. South Carolina	*State* v. *White*, 133 S.E.2d 320, 322 (S.C. 1963)
24. South Dakota	*State* v. *Oswald*, 241 N.W.2d 566, 570 (S.C. 1976)
25. Vermont	*State* v. *Persuitti*, 346 A.2d 208, 209 (Vt. 1975)

26. Virginia	*Hines* v. *Commonwealth*, 234 S.E.2d 262, 266 (Va. 1977)*
27. Washington	*State* v. *Goldstein*, 400 P.2d 368, 369 (Wash. 1965)* *State* v. *Tate*, 444 P.2d 150, 153 (Wash. 1968)[dictum that instruction proper] WASH.REV.CODE.ANN. §10.52.040 (1961)(see Appendix B)
28. West Virginia	*State* v. *McClung*, 140 S.E. 55, 56 (W.Va. 1927) *State* v. *McClure*, 253 S.E.2d 555 (W.Va. 1979)

*In each of these cases, while the issue on appeal was not the failure to instruct on defense request, the court stated that a "no inference" instruction is required on defense request.

**In each of these cases the court referred to the state's pattern instruction.

II. States Which Have Indicated By Inference Or Implication That A "No Inference" Instruction Should Be Given On Defense Request

State	Cases
1. Florida	*Fogler* v. *State*, 117 So. 694, 695 (Fla. 1928) [court notes defendant's concession that instruction at defense request proper and aproves *sua sponte* instruction.] *DeLaine* v. *State*, 230 So.2d 168, 175 (Ct.App.Fla. 1970) [*sua sponte* instruction again approved.]

2. Idaho	*State* v. Levy, 75 P. 227, 231 (Idaho 1904) [*sua sponte* instruction approved.]
3. Louisiana	*State* v. *Dierlamm*, 189 La. 544, 180 So. 135, 137-138 (1938) [dictum — not "imperative duty" to instruct but gives defendant additional protection.]
4. Massachusetts	*Commonwealth* v. *Sullivan*, 239 N.E.2d 5, 16 (Mass. 1968) [*sua sponte* instruction approved]
5. Nebraska	*State* v. *Botts*, 184 Neb. 78, 165 N.W.2d 358, 359-360 (1968) [*sua sponte* instruction approved — dictum that defendant could have urged reversal if instruction not given.] *State* v. *Cook*, 182 Neb. 684, 157 N.W. 2d 151, 155 (1968) [*sua sponte* instruction commended]
6. New Hampshire	*State* v. *Fowler*, 261 A.2d 429 (N.H. 1970) [dictum-court indicates that trial courts should abide by defendant's wishes regarding instruction.]
7. North Dakota	*State* v. *Marmon*, 154 N.W.2d 55, 62 (N.D. 1967) [*sua sponte* instruction approved.]

8. Ohio	*State* v. Nelson, 36 Ohio St.2d 79, 303 N.E.2d 865, 869 (1973) [conviction reversed because of failure to give instruction but court says decision is in trial court's discretion.]
9. Pennsylvania	*Commonwealth* v. *Thomas*, 429 Pa. 227, 239 A.2d 354, 357-358 (1968) [court upholds instruction given in case although notes it could have been better.] *Commonwealth* v. *Danzy*, 225 Pa.Super 234, 310 A.2d 291, 292 (1973) [instruction proper in absence of objection by defendant.]
10. Tennessee	*Evans* v. *State*, 557 S.W.2d 927, 936 (Tenn. 1977) [Instruction described as "proper."] *Rowan* v. *State*, 369 S.W.2d 543, 548 (Tenn. 1963) [no duty to give instruction *sua sponte*.]
11. Texas	*Jaffrion* v. *State*, 501 S.W.2d 322 326 (Tex. 1973) [Trial courts may give "no inference" instruction but failure to do so *sua sponte* does not constitute reversible error.]
12. Utah	*State* v. *Cox*, 277 P. 972, 973-974 (Utah 1929)["no inference" instruction cured error in prosecutor's comment on silence of defendant at trial.]

13. Wisconsin	*Champlain* v. *State*, 53 Wis.2d 751, 193 N.W.2d 868, 873 (1972)[*sua sponte* instruction approved — dictum that "better practice" is for trial court to give instuction only at defendant's request.]

III. States Which Prohibit A "No Inference" Instruction

State	Cases
1. Kentucky	*Green* v. *Commonwealth*, 488 S.W.2d 339, 341-342 (Ky. 1972)
2. Minnesota	*State* v. *Sandve*, 156 N.W.2d 230, 233-234 (Minn. 1968) *State* v. *Grey*, 256 N.W.2d 74, 77-78 (Minn. 1977)*
3. Nevada	*Jackson* v. *State*, 438 P.2d 795, 798 (Nev. 1968)** NEV.REV.STAT. §175.181 (1979) (see Appendix B)
4. Oklahoma	*Brannin* v. *State*, 375 P.2d 276, 279-280 (Okla.Cr. 1962) *Hanf* v. *State*, 560 P.2d 207, 212 (Okla.Cr. 1977)
5. Wyoming	*Kinney* v. *State*, 256 P. 1040, 1042 (Wyo. 1927)

*Minnesota Supreme Court indicates that instruction may be necessary in some cases to prevent manifest injustice.

**NEV.REV.STAT. §175.181 (1979) which specifically prohibits a "no inference" instruction permits an instruction that a defendant cannot be compelled to be a witness against himself.

APPENDIX B. STATE STATUTES OR RULES RELEVANT TO DRAWING INFERENCES FROM DEFENDANT'S FAILURE TO TESTIFY AND/OR COMMENT UPON THAT FAILURE

1. Alabama — ALA. CODE tit.12 §12-21-220 (1975)+

   §12-21220. Right of defendant to be witness; effect of prosecution's comment on defendant's failure to testify.

   On the trial of all indictments, complaints or other criminal proceedings, the person on trial shall, at his own request, but not otherwise, be a competent witness, and his failure to make such a request shall not create any presumption against him nor be the subject of comment by counsel. If the district attorney makes any comment concerning the defendant's failure to testify, a new trial must be granted on motion filed within 30 days from entry of the judgment.

2. Arizona — ARIZ.REV.STAT. §13-117 (1956).

   §13-117. Defendant as witness; no comment on failure to testify

   A. A defendant in a criminal action or proceeding shall not be compelled to be a witness against himself, but may be a witness in his own behalf. If he offers himself as a witness in his own behalf, he may be cross-examined to the same extent and subject to the same rules as any other witness.

   B. The defendant's neglect or refusal to be a witness in his own behalf shall not in any manner prejudice him, or be used against him on the trial or proceedings.

3. Arkansas — ARK.STAT.ANN §43-2016 (1947)

   §43-2016. Accused as witness.

   On trial of all indictments, informations, complaints,

and other proceedings against persons charged with the commission of crimes, offenses and misdemeanors in the State of Arkansas, the person so charged shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him.

4. California — CAL. EVIDENCE CODE §913 (Deering 1966)++

   §913. Comment on, and inferences from, exercise of privilege.

   (a) If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

   (b)The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

5. Connecticut — CONN.GEN.STAT.ANN. §54-84 (West 1958)++

   §54-84. Testimony or silence of accused. Privilege of spouse.

   (a) Any person on trial for crime shall be a competent witness, and at his or her option may testify or refuse to testify upon such trial. If such person has a

husband or wife, he or she shall be a competent witness but may elect or refuse to testify for or against the accused, except that either spouse who has received personal violence from the other or is the spouse of one who is charged with violation of any sections 53-20, 53-21, 53-23, 53-25, 53-304, 53a-72 and 53a-83 to 53a-88, inclusive, may, upon his or her trial for offenses arising out of such personal violence or from violation of the provisions of any of said sections, be compelled to testify in the same manner as any other witness. The neglect or refusal of an accused party to testify shall not be commented upon by the court or prosecuting official, except as provided in subsection (b) of this section.

(b) Unless the accused requests otherwise, the court shall instruct the jury that they may draw no unfavorable inferences from the accused's failure to testify. In cases tried to the court, no unfavorable inferences shall be drawn by the court from the accused's silence.

6. Delaware — DEL. CODE tit. 11, §3501 (1979)+

§3501. Testimony of accused persons.

Every person who is accused of any crime whatsoever, punishable by the laws of this State, may upon his trial before any tribunal established by the Constitution or laws of this State, testify in his own behalf, and may testify for or against any other person jointly tried with him. A refusal or failure to testify shall not be construed or commented upon as an indication of guilt.

7. Florida — FLA.STAT.ANN., R.CRIM.PROC., R.3.250+

Rule 3.250. Accused as Witness

In all criminal prosecutions the accused may at his option be sworn as a witness in his own behalf, and

shall in such case be subject to examination as other witnesses, but no accused person shall be compelled to give testimony against himself, nor shall any prosecuting attorney be permitted before the jury or court to comment on the failure of the accused to testify in his own behalf, and a defendant offering no testimony in his own behalf, except his own, shall be entitled to the concluding argument before the jury.

8. Georgia — GA. CODE ANN. §38-415 (1974)+

38-415 (1036 P.C.) Prisoner's testimony.

If the prisoner wishes to testify and announces in open court his intention to do so, he may so testify in his own behalf. If so, he shall be sworn as any other witness and may be examined and cross-examined as any other witness, except that no evidence of general bad character or prior convictions shall be admissible unless and until the defendant shall have first put his character in issue. Evidence of prior felony convictions may be admitted in those cases where the same are alleged in the indictment as provided by law. The failure of a defendant to testify shall create no presumption against him, and no comment shall be made because of such failure: Provided, however, in the event the defendant elects to be sworn and examined, he shall not lose his right to open and conclude the argument to the jury, if he has not introduced other evidence in the trial.

9. Hawaii — HAV.REV.STAT. §621-15 (1976)

§621-15. Accused; refusal to testify not prejudicial.

The defendant in any criminal proceeding may give evidence on his own behalf, and thereupon be subject to cross-examination in like manner as any other witness, but in case any such person neglects or declines to offer himself as a witness no inference

shall be drawn prejudicial to the accused by reason of such neglect or refusal, nor shall any argument be permitted tending to injure the defense of the accused person on account of such failure to offer himself as a witness.

10. Idaho — IDAHO CODE §19-3003 (1949)

§19-3003. Defendant not obliged to testify.

A defendant in a criminal action or proceeding to which he is a party, is not, without his consent, a competent witness for or against himself. His neglect or refusal to give such consent shall not in any manner prejudice him nor be used against him on the trial or proceeding.

11. Illinois — ILL.ANN.STAT. ch. 38, §155-1 (Smith-Hurd 1973)+

§155-1. Disqualifications Removed — Testimony of Husband or Wife.

No person shall be disqualified as a witness in any criminal case or proceeding by reason of his or her interest in the event of the same, as a party or otherwise, or by reason of his or her having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting the credibility of the witness: Provided, however, that a defendant in any criminal case or proceeding shall only at his or her own request be deemed a competent witness, and the person's neglect to testify shall not create any presumption against the person, nor shall the court permit any reference or comment to be made to or upon such neglect.

In all criminal cases, husband and wife may testify for or against each other: provided, that neither may testify as to any communication or admission made by either of them to the other or as to any conversation between them during marriage, except in cases

where either is charged with an offense against the person or property of the other or in case of spouse abandonment, or where the interests of their child or children are directly involved, or as to matters in which either has acted as agent of the other.

12. Indiana — IND.CODE ANN. §35-1-31-3 (Burns 1979)

§35-1-31-3 [9-1603]. Who are competent witnesses.

The following persons are competent witnesses:

First. All persons who are competent to testify in civil actions.

Second. The party injured by the offense committed.

Third. Accomplices, when they consent to testify.

Fourth. The defendant, to testify in his own behalf. But if the defendant do [sic] not testify, his failure to do so shall not be commented upon or referred to in the argument of the cause, nor commented upon, referred to, or in any manner considered by the jury trying the same; and it shall be the duty of the court, in such case, in its charge, to instruct the jury as to their duty under the provisions of this section.

13. Kansas — KAN.STAT. §60-439 (1976) $^{+}_{+}$

§60-439. Reference to exercise of privilege; presumption and adverse inference not permitted.

If a privilege is exercised not to testify or to prevent another from testifying either in the action or with respect to particular matters, or to refuse to disclose or to prevent another from disclosing any matter, the judge and counsel may not comment thereon, no presumption shall arise with respect to the exercise of the privilege, and the trier of fact may not draw any adverse inference therefrom. In those jury cases wherein the right to exercise a privilege, as herein

provided, may be misunderstood and unfavorable inferences drawn by the trier of the fact, or may be impaired in the particular case, the court, at the request of the party exercising the privilege, may instruct the jury in support of such privilege.

14. Kentucky — KY.REV.STAT. §421.225 (1979)+

421.225. Testimony of defendant.

In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him.

15. Maine — ME.REV.STAT.tit.15, §1315 (1964)

§1315. Self-incrimination; failure to testify; husband or wife as witness

In all criminal trials, the accused shall, at his own request but not otherwise, be a competent witness. He shall not be compelled to testify on cross-examination to facts that would convict, or furnish evidence to convict him of any other crime than that for which he is on trial. The fact that he does not testify in his own behalf shall not be taken as evidence of his guilt. The husband or wife of the accused is a competent witness except in regard to marital communications.

16. Maryland — MD. CTS. AND JUD. PROC. §9-107 (1980)

§9-107.22Defendant in a criminal trial.

A person may not be compelled to testify in violation of his privilege against self-incrimination. The failure of a defendant to testify in a criminal proceeding on this basis does not create any presumption against him.

17. Massachusetts — MASS.GEN.LAWS ANN.ch. 233, §20 (West 1959)

§20. Competency of Witnesses.

Any person of sufficient understanding, although a party, may testify in any proceeding, civil or criminal, in court or before a person who has authority to receive evidence, except as follows:

First, Except in a proceeding arising out of or involving a contract made by a married woman with her husband and except in a proceeding under chapter two hundred and seventy-three A and in a prosecution begun under sections one to ten, inclusive, of chapter two hundred and seventythree, neither husband nor wife shall testify as to private conversations with the other.

Second, Except as otherwise provided in section seven of chapter two hundred and seventy-three, neither husband nor wife shall be compelled to testify in the trial of an indictment, complaint or other criminal proceeding against the other.

Third, The defendant in the trial of an indictment, complaint or other criminal proceeding shall, at his own request, but not otherwise, be allowed to testify, but his neglect or refusal to testify shall not create any presumption against him.

18. Michigan — MICH.COMP.LAWS ANN. §600.2159 (1968)+

§600.2159 Parties as witnesses; depositions; comment on failure of criminal defendant to testify

Sec. 2159. On the trial of any issue joined, or in any matter, suit or proceeding, in any court, or on any inquiry arising in any suit or proceeding in any court, or before any officer or person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties to any such suit or proceeding named in the record; and persons for

whose benefit such suit or proceeding is prosecuted, or defended, may be witnesses therein in their own behalf or otherwise, in the same manner as other witnesses, except as hereinafter otherwise provided; and the deposition of any such party or person may be taken and used in evidence under the rules and statutes governing depositions, and any such party or person may be proceeded against and compelled to attend and testify, as is provided by law for other witnesses. No person shall be disqualified as a witness in any civil or criminal case or proceeding by reason of his interest in the event of the same as a party or otherwise or by reason of his having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting his credibility. A defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the cour tpermit any reference or comment to be made to or upon such neglect.

19. Minnesota — MINN.STAT.ANN. §611.11 (West 1964)+

§611.11 No presumption from failure to testify

The defendant in the trial of an indictment, complaint, or other criminal proceeding shall, at his own request and not otherwise, be allowed to testify; but his failure to testify shall not create any presumption against him, nor shall it be alluded to by the prosecuting attorney or by the court.

20. Mississippi — MISS.CODE ANN. §13-1-9 (1972)

§13-1-9. Competency of an accused.

The accused shall be a competent witness for himself in any prosecution for crime against him. The failure of the accused, in any case, to testify shall not however operate to his prejudice or be commented on by counsel.

21. Missouri — MO.ANN.STAT., SUP.CT.R., R.CRIM.PROC.27.05 ++

Rule 27.05. Misdemeanors or Felonies — Failure of Defendant or Wife to Testify

(a)If the defendant shall not avail himself or herself of his or her right to testify, or of the testimony of the wife or husband, on the trial in the case, it shall not be construed to affect the innocence or guilt of the accused, nor shall the same raise any presumption of guilt, nor be referred to by any attorney in the case, nor be considered by the court or jury before whom the trial takes place.

(b) If the defendant does not testify, and the defendant so requests, but not otherwise, the court shall instruct the jury in writing as follows:

"Under the law, a defendant has the right not to testify. No presumption of guilt may be raised and no inference of any kind may be drawn from the fact that defendant did not testify."

22. Nevada — NEV.REV.STAT. §175.181 (1979)**

§175. 181. Instruction not to be given relative to failure of defendant to testify.

1. No instruction shall be given relative to the failure of the person charged with the commission of crime or offense to testify, except, upon the request of the person so charged, the court shall instruct the jury that, in accordance with a right guaranteed by the constitution, no person can be compelled, in a criminal action, to be a witness against himself.

2. Nothing herein contained shall be construed as compelling any such person to testify.

23. New Hampshire — N.H.REV.STAT.ANN. §516:31 & §516:32 (1974)+

§516:31. Respondents in Criminal Cases.

In the trial of indictments, complaints and other proceedings against persons charged with the commission of crimes and offenses the person so charged shall, at his own request, but not otherwise, be a competent witness.

§16:32. Limitation.

Nothing herein contained shall be construed as compelling any such person to testify, nor shall any inference of his guilt result if he does not testify, nor shall the counsel for the prosecution comment thereon in case the respondent does not testify.

24. New Jersey — N.J.STAT.ANN. §2A:84A-17 (West 1952*

2A:84A-17. Privilege of accused

Rule 23.

(1) Every person has in any criminal action in which he is an accused a right not to be called as a witness and not to testify.

Additions in text indicated by *underline*; deletions by ~~strikeouts~~

(2) The spouse of the accused in a criminal action shall not testify in such action except to prove the fact of marriage unless (a) such spouse and the accused shall both consent, or (b) the accused is charged with an offense against the spouse, a child of the accused or of the spouse, or a child to whom the accused or the spouse stands in the place of a parent or (c) such spouse is the complainant.

(3) An accused in a criminal action has no privilege to refuse when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of the fact, except to refuse to testify.

~~(4) If an accused in a criminal action does not testify after direct evidence is received of facts which tend to prove some element of the crime and which facts, if untrue, he could disprove by his own testimony, counsel and the judge may comment on his failure to testify, and the trier of fact may draw an inference that accused cannot truthfully deny these facts.~~

Amended Sept. 14, 1979, effective July 1, 1980.

25. New Mexico — N.M.STAT.ANN., R.EV., R. 513+ +

Rule 513. Comment upon or inference from claim of privilege; instruction

(a) Comment or inference not permitted. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(b) Claiming privilege without knowledge of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

26. New York — N.Y.CRIM.PROC LAW §300.10 (Consol. 1979)+ +

§300.10. Court's charge; in general

1. At the conclusion of the summations, the court must deliver a charge to the jury.

2. In its charge, the court must state the fundamental legal principles applicable to criminal cases in general. Such principles include, but are not limited to, the presumption of the defendant's innocence,

the requirement that guilt be proved beyond a reasonable doubt and that the jury may not, in determining the issue of guilt or innocence, consider or speculate concerning matters relating to sentence or punishment. Upon request of a defendant who did not testify in his own behalf, but not otherwise, the court must state that the fact that he did not testify is not a factor from which any inference unfavorable to the defendant may be drawn. The court must also state the material legal principles applicable to the particular case, and, so far as practicable, explain the application of the law to the facts, but it need not marshal or refer to the evidence to any greater extent than is necessary for such explanation.

27. North Carolina — N.C.GEN.STAT. §8-54 (1969)

§8-54. Defendant in criminal action competent but not compellable to testify.

In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise a competent witness, and, his failure to make such request shall not create any presumption against him. But every such person examined as a witness shall be subject to crossexamination as other witnesses. Except as above provided, nothing in this section shall render any person, who in any criminal proceeding is charged with the commission of a criminal offense, competent or compellable to give evidence against himself, nor render any person compellable to answer any question tending to criminate himself.

28. North Dakota — N.D.CENT.CODE §29-21-11 (1974)+

§29-21-11. Defendant witness in own behalf.

In the trial of a criminal action or proceeding before any court or magistrate of this state, whether prosecuted by information, indictment, complaint, or otherwise, the defendant, at his own request and not otherwise, shall be deemed a competent witness, but his neglect or refusal to testify shall not create or raise any presumption of guilt against him. Nor shall such neglect or refusal be referred to by any attorney prosecuting the case, or considered by the court or jury before whom the trial takes place.

29. Ohio — OHIO REV.CODE ANN. §2945.43 (Baldwin 1971)*

§2945.43. Defendant may testify.

On the trial of a criminal cause, a person charged with an offense may, at his own request, be a witness, but not otherwise. The failure of such person to testify may be considered by the court and jury and may be made the subject of comment by counsel.

30. Oklahoma — OKLA.STAT.ANN.tit.22, §701 (West 1969)+

§701. Defendant a competent witness — Comment on failure to testify — Presumption

In the trial of all indictments, informations, complaints and other proceedings against persons charged with the commission of a crime, offense or misdemeanor before any court or committing magistrate in this State, the person charged shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him nor be mentioned on the trial; if commented upon by counsel it shall be ground for a new trial.

31. Oregon — OR.REV.STAT. §136.643 (1979)

§136.643. Defendant as witness.

In the trial of or examination upon any indictment complaint, information or other proceeding before any court, magistrate, jury or other tribunal against a person accused or charged with the commission of a crime, the person so charged or accused shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the court, or to the discrimination of the magistrate, grand jury or other tribunal before which such testimony is given. His waiver of this right creates no presumption against him. The defendant or accused, when offering his testimony as a witness in his own behalf, gives the prosecution a right to cross-examination upon all facts in which he has testified and which tend to his conviction or acquittal.

32. Pennsylvania — PA.STAT.ANN.tit.42 §5941 (Purdon 1975)+

§5941. Persons who may be compelled to testify.

(a) General rule — Except defendants actually upon trial in a criminal proceeding, any competent witness may be compelled to testify in any matter, civil or criminal; but he may not be compelled to answer any question which, in the opinion of the trial judge, would tend to incriminate him; nor may the neglect or refusal of any defendant, actually upon trial in a criminal proceeding, to offer himself as a witness, be treated as creating any presumption against him, or be adversely referred to by court or counsel during the trial.

33. Rhode Island — R.I.GEN.LAWS §12-17-9 (1969)+

§12-17-9. Defendant as witness.

No respondent in a criminal prosecution, offering himself as a witness, shall be excluded from testifying because he is such respondent; and neglect or

refusal so to testify shall create no presumption nor be used in argument against him.

34. South Dakota — S.D. COMPILED LAWS ANN. §23A-22-6 (1979)

§23A-22-6. Defendant's right to testify. No presumption from failure to testify.

In a trial of all indictments, informations, complaints and other proceedings before any court or magistrate, against persons charged with the commission of any crime, the person charged shall, at his own request, but not otherwise, be a competent witness. His failure to make such request does not create any presumption against him.

35. Tennessee — TENN.CODE ANN. §40-2403 (1975).

§40-2403. Failure of defendant to testify — Order of testimony.

The failure of the party defendant to make such request and to testify in his own behalf, shall not create any presumption against him. But the defendant desiring to testify shall do so before any other testimony for the defense is heared by the court trying the case.

36. Texas — TEX.STAT.ANN.Art. 38.08 (1979)+

Art. 38.08. Defendant may testify.

Any defendant in a criminal action shall be permitted to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause.

37. Utah — UTAH CODE ANN. §77-44-5 (1978)

§77-44.5. Cross-examination of defendant — Failure to testify not to prejudice.

If a defendant offers himself as a witness, he may be cross-examined by the counsel for the state the same as any other witness. His neglect or refusal to be a witness shall not in any manner prejudice him or be used against him on the trial or proceeding.

38. Vermont — VT.STAT.ANN.tit. 13, §6601 (1974)+

§6601. Respondent as witness.

In the trial of complaints, informations, indictments and other proceedings against persons charged with crimes or offenses, the person so charged shall, at his own request and not otherwise, be deemed a competent witness. The credit to be given to his testimony shall be left solely to the jury, under the instructions of the court but the failure of such person to testify shall not be a matter of comment to the jury by either the court or the prosecutor and shall not be considered by the jury as evidence against him.

39. Virginia — VA.CODE §19.2-268 (1975)§

§19.2-268. Right of accused to testify.

In any case of felony or misdemeanor, the accused may be sworn and examined in his own behalf, and is so sworn and examined, he shall be deemed to have waived his privilege of not giving evidence against himself, and shall be subject to cross-examination as any other witness; but his failure to testify shall create no presumption against him, nor be the subject of any comment before the court or jury by the prosecuting attorney.

40. Washington — WASH.REV.CODE ANN. §10.52.040 (1961)+ +

§10.52.040. Compelling witness to attend and testify — Accused as witness — Admonitory instructions.

Witnesses may be compelled to attend and testify before the grand jury; and witnesses on behalf of the state, or of the defendant, in a criminal prosecution, may be compelled to attend and testify in open court, if they have been subpoenaed, without their fees being first paid or tendered, unless otherwise provided by law; the court may, upon the motion of the prosecuting attorney or defense counsel, recognize witnesses, with or without sureties, to attend and testify at any hearing or trial in any criminal prosecution in any court of this state, or before the grand jury. In default of such recognizance, or in the event that surety is required and has not been obtained the court shall require the appearance of the witness before the court and shall appoint counsel for the witness he if he is indigent and then shall determine that the testimony of the witness would be material to either the prosecution or the defendant and that the witness would not attend the trial of the matter unless detained and, therefore, the court may direct that such witness shall be detained in the custody of the sheriff until the hearing or trial in which the witness is to testify: Provided, That each witness detained for failure to obtain surety shall be paid, in addition to witness fees for actual appearance in court, for each day of his detention a sum equal to the daily jury fee paid to a juror serving in a superior court; and each witness in breach of recognizance and who is detained therefor shall be paid, in addition to witness fees for actual appearance in court, the sum of one dollar for each day of his detention. Any such witness shall be provided food and lodging while so detained. Any person accused of any crime in this state, by indictment information, or otherwise, may, in the examination or trial of the cause, offer himself, or herself, as a witness in his or her own behalf, and

shall be allowed to testify as other witnesses in such case, and when accused shall so testify, he or she shall be subject to all the rules of law relating to cross-examination of other witnesses. Provided, That nothing in this code shall be construed to compel such accused person to offer himself or herself as a witness in such case: And provided further, That it shall be the duty of the court to instruct the jury that no inference of guilt shall arise against the accused if the accused shall fail or refuse to testify as a witness in his or her own behalf.

41. West Virginia — W.VA.CODE §57-3-6 (1966)+

§57-3-6. Competency of accused as witness.

In any trial or examination in or before any court or officer for a felony or misdemeanor, the accused shall, with his consent (but not otherwise), be a competent witness on such trial or examination; and if he so voluntarily becomes a witness he shall, as to all matters relevant to the issue, be deemed to have waived his privilege of not giving evidence against himself and shall be subject to cross-examination as any other witness; but his failure to testify shall create no presumption against him, nor be the subject of any comment before the court or jury by anyone.

42. Wisconsin — WIS.STAT.ANN. §325.13 (West 1958)

§325.13. Party may be witness, credibility

(1) No person shall be disqualified as a witness in any action or proceeding, civil or criminal, by reason of his interest therein; and every person shall, in every such case, be a competent witness, except as otherwise provided in this chapter. But his interest or connection may be shown to affect the credibility of the witness.

(2) In all criminal actions and proceedings the party charged shall at his own request, but not otherwise,

be a competent witness; but his refusal or omission to testify shall create no presumption against him or any other party thereto.

43. Wyoming — WYO.STAT. §7-11-401 (1977)

§7-11-401. Testimony of defendant.

The defendant in all criminal cases, in all the courts in this state, may be sworn and examined as a witness, if he so elects, but shall not be required to testify in any case unless he has been lawfully granted immunity from prosecution, penalty or forfeiture and the neglect or refusal to testify without such immunity having been granted shall not create any presumption against him, nor shall any reference be made to, nor shall any comment be made upon, such neglect or refusal to testify.

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* New Jersey and Ohio are the only states with statutes which recently permitted comment on the defendant's failure to testify. However, N.J.STAT.ANN. § 2A:84A-17(4) (West 1952) was repealed effective July 1, 1980. And Ohio's Supreme Court has declared OHIO REV. CODE ANN. § 2945.43 (Baldwin 1971) unconstitutional in *State* v. *Nelson*, 36 Ohio St. 2d 79, 303 N.E.2d 865, 868 (1973).

* NEV.REV.STAT. § 175.181 (1979) which specifically prohibits a "no inference" instruction but permits an instruction that a defendant cannot be compelled to be a witness against himself is unique.

+ These twenty-three states specifically prohibit comment on the defendant's failure to testify.

+ + These seven states require by statute that the trial court give a "no inference" instruction when the defendant does not testify. However, California, Connecticut, Kansas, Missouri, New Mexico, and New York provide that the instruction should only be given at the defendant's request.

APPENDIX C. SAMPLE STATE PATTERN INSTRUCTIONS

1. Kansas — KAN.STAT. P.I.K. 5213

   PIK 52.13 Defandant's Failure to Testify.

   You should not consider the fact that the defendant did not testify in arriving at your verdict.

   Notes on Use

   This instruction should not be given unless there is a specific request by the defendant.

2. New Mexico — N.M.STAT.ANN.JUD. VOL.2, U.J.I. — CRIM. 40.31

   UJI Crim. 40.31. Defendant not testifying; no inference of guilt.[1]

   You must not draw any inference of guilt irom the fact that the defendant did not testify in this case, nor should this fact be discussed by you or enter into your deliberation in any way.

   Use Note

   [1]This instruction must be given on request of a defendant who does not testify and must not be given if the defendant objects.